

1989

# Alta Ridge Associates, FMA Leasing Company v. Citizen's Bank and Ken Baxter : Brief of Respondent

Utah Supreme Court

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Stewart M. Hanson; Charles P. Sampson; Switter, Axland, Armstrong & Hanson.

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UTAH SUPREME COURT

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DOCKET NO. \_\_\_\_\_

BRIEF

890220

IN THE UTAH SUPREME COURT

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ALTA RIDGE ASSOCIATES and	:	
FMA LEASING COMPANY,	:	
	:	
Plaintiffs,	:	
	:	Case No. 890220
-v-	:	Priority No. 14 b.
	:	
CITIZENS BANK and KEN BAXTER,	:	
	:	
Defendants.	:	

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BRIEF OF RESPONDENT FIDELITY NATIONAL  
TITLE INSURANCE COMPANY

---

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY  
HONORABLE TIMOTHY R. HANSON  
Date of Judgment March 31, 1989  
Case No. C82-9240

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FEB 15 1990

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Clerk, Supreme Court, Utah

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PARTIES NOT INVOLVED  
IN THIS APPEAL

3. Alta Ridge Associates
4. Citizens Bank
5. Ken Baxter
6. Alta Title Company

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### JURISDICTION

Section 3 of Article VIII of the Utah Constitution, Section 78-2-2(3) of Utah Code Ann., Rule 54(b) and Rule 3(a) of the Rules of the Utah Supreme Court confer jurisdiction on this Court to hear this appeal

### NATURE OF PROCEEDINGS

This appeal is from an Order of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson presiding, granting partial summary judgment ("Order") for attorney's fees incurred by Fidelity National Title Insurance Company ("Fidelity") in defending the title of its insured, Alta Ridge Associates ("Alta Ridge") as a result of a breach of deed warranties under a Special Warranty Deed by which FMA Leasing Company ("FMA") conveyed title to property known as the Alta Via property ("the property") to Alta Ridge.

### PERTINENT STATUTES

The Utah Code provides a statutory scheme relating to the forms of deeds. No specific provision is made for the form of a special warranty deed. Section 57-1-12, Utah Code Ann., relating to a warranty deed is as follows:

Form of Warranty Deed - Effect. Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with the appurtenances, rights and privileges thereunto belonging, with covenants from the grantor, his heirs and personal

representatives, that he is lawfully seized of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs and assigns in the quiet possession thereof; that the premises are free from all encumbrances; and the grantor, his heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever. Any exceptions to such covenants may be briefly inserted in such deed following the description of the land.

Section 78-40-2 Utah Code Ann. relating to the filing of a lis pendens provides as follows:

In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

#### STANDARD OF REVIEW

Summary judgment is appropriate whenever "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P.

Rule 56(c). When reviewing a summary judgment, an appellate court applies the same standard as that applied by the trial court. Briggs v. Holcomb, 740 P.2d 281 (Utah App. 1987). In this case, there are no facts in dispute, only a question of the application of the law to those facts.

#### CITATION TO THE RECORD

Citations to the record will be abbreviated as follows:

Record on Appeal:	"R."
Trial Transcript:	"Tr."
Exhibit:	"Ex."
Addendum:	"Add."

#### STATEMENT OF THE CASE

This action arose when FMA and Alta Ridge filed an action (R. 2-29) to enjoin Citizens Bank from foreclosing on the property which had been conveyed by Special Warranty Deed from FMA to Alta Ridge. (Ex. 12; Add. 25-27). Citizens Bank had been assigned a Trust Deed executed by the former owner of the property, Dale Morgan ("Morgan"), in favor of 4-Seasons Development, Inc. ("4-Seasons"). (Exs. 5 and 51; Add. 5-6 and 18-20). The property had been purchased by Morgan who paid the purchase price as follows:

1. \$300,000.00 secured by first Trust Deed in favor of FMA. (Ex. 3; Add. 1-4).
2. \$100,000.00 secured by second Trust Deed in favor of Thomas Herr. (Ex. 4).

3. \$42,000.00 secured by third Trust Deed in favor of 4-Seasons. (Ex. 5; Add. 5-6).

Morgan defaulted on the obligation to FMA immediately after the purchase of the property had been completed. (R. 1116). FMA took a Quit Claim Deed from Morgan on June 6, 1978, three months after Morgan's purchase of the property in lieu of foreclosing its First Trust Deed interest. (Ex. 6; Add. 7-8). FMA proceeded to entertain offers for the purchase of the property and otherwise attempt to market the property. (Ex. 40).

Over a year after obtaining the Quit Claim Deed, FMA initiated an action on the first Trust Deed executed by Morgan (Ex. 7), attempting to foreclose the interests of various lienholders in the property and obtain clear title. In conjunction with the foreclosure action, FMA prepared a Lis Pendens but failed to have the Lis Pendens recorded with the Salt Lake County Recorder. (R. 1359). By stipulation 4-Seasons, Thomas Herr and certain other lienholders agreed that the property could "be sold [by FMA] free and clear of all claims by the parties . . . ." (Ex. 8; Add. 12-17). Subsequent to the execution of the Stipulation but prior to the entry on February 27, 1981 of the Order of Foreclosure based upon the Stipulation (Ex. 11; Add. 21-26), 4-Seasons assigned its Trust Deed to Citizens Bank on February 10, 1981. (Ex. 51; Add. 18-20). Citizens Bank was not a party to the Stipulation

giving the FMA Trust Deed priority. On April 29, 1981 FMA conveyed the property to Alta Ridge by Special Warranty Deed. (Ex. 12).

The jury found that the 4-Seasons Trust Deed which had been assigned to Citizens Bank was unenforceable for lack of consideration and failure of a condition subsequent. The jury also found that FMA intended to merge its Trust Deed from Morgan into the Quit Claim Deed taken from Morgan, giving FMA title to the property on June 6, 1978, the date of the Quit Claim Deed. (R. 843-44; Add. 37-38). Accordingly, the 4-Seasons Trust Deed was assigned during FMA's ownership of the property.

Subsequent to the jury verdict, Fidelity, standing in the place of its insured, brought a Motion for Summary Judgment on Alta Ridge's crossclaim against FMA to recover attorney's fees incurred as a result of the breach by FMA of its deed warranties under the Special Warranty Deed. (R. 1523-1554). The Court granted the Motion on October 6, 1986 (R. 1625; Add. 41-43) and on March 31, 1989, an Order was entered awarding Fidelity National Title \$50,022.15<sup>1</sup> in attorney's fees incurred in defending the title of Alta Ridge. (R. 1929; Add. 44-46).

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<sup>1</sup>Counsel for FMA stipulated at the hearing on the Motion for an Award of Attorney's Fees that the attorney's fees claimed by Fidelity were reasonable and offered no objection to the amount. (Tr. 1951, p. 6; Add. 52).

### STATEMENT OF FACTS

The following facts are necessary for a proper determination of this appeal in addition to and/or to rectify the facts set forth in the Brief of FMA.

1. On or about June 6, 1978, three months after the sale of the property to Morgan, FMA, as the holder of the first Trust Deed obtained from Morgan a Quit Claim Deed in lieu of foreclosure upon the first Trust Deed. (Ex. 6; Add. 7-8).

2. FMA then entertained offers for the purchase of the property and otherwise attempted to market the property in its own name. (Ex. 40).

3. In July of 1979, over a year after accepting the Quit Claim Deed from Morgan, FMA initiated a judicial foreclosure action. (Ex. 7).

4. FMA prepared a Lis Pendens reflecting the initiation of the foreclosure action and sent the Lis Pendens to Utah Title and Abstract Company ("Utah Title") for filing and recordation. Utah Title failed to record the Lis Pendens, however. (Tr. 1359).

5. When the present action was commenced, FMA Leasing Company initially named Utah Title as a defendant in the action for its failure to record the Lis Pendens (R. 93-94, para. 50-54), but later dismissed its action against Utah Title. (R. 157-158). No explanation was given by FMA for the dismissal.

6. On October 28, 1980, the parties to the judicial foreclosure action initiated by FMA, including 4-Seasons, stipulated the property could be sold by FMA free and clear of any claims, including the claim of 4-Seasons. (Ex. 8; Add. 12-17).

7. On February 10, 1981, Ken Baxter ("Baxter"), President of 4-Seasons, assigned the 4-Seasons Trust Deed to Citizens Bank and the Assignment was recorded on February 13, 1981. (Ex. 51; Add. 18-20). Although Baxter had stipulated to the priority of FMA's interest, Citizens Bank had not.

8. On February 27, 1981, an Order was entered in the foreclosure action, approving the terms of the Stipulation and ordering that the property be sold by FMA free and clear of any claims. (Ex. 11; Add. 21-24).

9. On April 29, 1981, FMA conveyed the property to Alta Ridge by Special Warranty Deed. (Ex. 12; Add. 25-27).

10. After a four day trial on the issue of the validity and priority of the 4-Seasons Trust Deed and its Assignment to Citizens Bank, the jury determined that FMA intentionally merged its Trust Deed into the Quit Claim Deed from Morgan. (R. 843-44; Add. 37-38).

#### SUMMARY OF ARGUMENT

In the Special Warranty Deed, FMA conveyed to Alta Ridge and warranted the property "against all claiming by, through, or under it". Although the Utah statutory scheme makes no

specific provision for the use of a special warranty deed, case law cited by FMA from other jurisdictions holds that this language of a special warranty deed warrants against encumbrances caused, suffered or made by the grantor. "Suffered" within this context means something within the power or duty of the grantor to have avoided. FMA caused or suffered the 4-Seasons Trust Deed to continue as an encumbrance against the property not only because the Assignment occurred during the time it held title to the property, but also because FMA failed to properly record a lis pendens in its foreclosure action. That omission of FMA allowed Citizens Bank to claim status as a bona fide purchaser under the Assignment.

The jury found that FMA intentionally merged its First Trust Deed against the property into the Quit Claim Deed it accepted from Dale Morgan. The Quit Claim Deed was accepted in lieu of foreclosure within three months after the sale of the property to Morgan on June 6, 1978. The 4-Seasons Trust Deed was not assigned to Citizens Bank until February 10, 1981. Thus, the Assignment was created during FMA's ownership of the property.

FMA commenced a judicial foreclosure in July of 1979 to extinguish various claims, including the 4-Seasons Trust Deed against the property. A Lis Pendens was prepared by FMA, but although the Lis Pendens was filed with the Clerk of the Court in which the action was commenced, it was never recorded with



the Salt Lake County Recorder, giving no one constructive notice of the pending foreclosure action. Thus, Citizens Bank was able to claim it lacked the constructive notice which a lis pendens would have given, in addition to claiming it lacked any actual notice of the foreclosure action.

The failure to record the Lis Pendens and resultant claim of Citizens Bank also contravened a provision of the Addendum to the Earnest Money Receipt and Offer to Purchase ("Addendum") in which FMA agreed to "complete the foreclosure action presently pending" in order to extinguish claims against the property. FMA admitted that the sale of the property was contingent upon FMA successfully completing its foreclosure.

When FMA conveyed the property to Alta Ridge it did so on other than a pre-printed form. Five specific exceptions were listed in FMA's Special Warranty Deed and the 4-Seasons Trust Deed was not so excepted.

FMA, in its Brief, addresses only the issues of breach of the covenant against encumbrances and actual eviction of a grantee thereunder. The case law cited by FMA ignores other deed warranties such as the covenant of quiet enjoyment, the covenant of seisin or the covenant to warrant and defend title. Additionally, it is sufficient to constitute a breach of the covenant against encumbrances if the eviction is constructive. Here, it was only the commencement of this lawsuit and issuance of a Temporary Restraining Order one day

prior to the scheduled trustees' sale by Citizens Bank that prevented Alta Ridge from being dispossessed of or evicted from the property. The assertion by Citizens Bank of a superior claim and the subsequent legal actions attempting to further that claim were sufficient to constitute constructive eviction of Alta Ridge and a breach of other deed warranties.

Fidelity, as the insurer of Alta Ridge, is subrogated to the right of Alta Ridge to recover attorney's fees against FMA as a result of FMA's breach of the deed warranties. An insurer has the right to recover for damages it is obligated to pay under its policy. The title policy obligated Fidelity to pay attorney's fees for the defense of a claim against the title it insured. The title policy also grants to Fidelity the right of subrogation if it pays or settles a claim. "Settle" is synonymous with "dispose" and signifies that a controversy has been adjusted, brought to an end, and it may include a determination on the merits. By disposing of the claim of Citizens Bank and obtaining a determination on the merits that the claim did not have priority, Fidelity settled the claim within the meaning of the subrogation clause in the title policy.

Further, a letter dated December 22, 1982 and copied to then counsel for FMA confirmed that Fidelity's counsel, Donald J. Winder, was undertaking the representation of Alta Ridge Associates in the litigation. FMA failed from that date until after the case was tried to object and should be equitably

estopped from doing so now. The fact that Fidelity lived up to its contractual obligations and paid the legal expenses for defense of the action directly rather than requiring Alta Ridge to pay the expenses and then look to Fidelity for reimbursement does not alter the principle of subrogation whereby the ultimate discharge of a debt should be paid by the person who, in equity and in good conscience, ought to pay it. FMA breached its deed warranties and should be required to pay the attorney's fees incurred as a result of that breach.

FMA's unliquidated contingent claim against Fidelity cannot be set off against a liquidated debt nor can the enforcement of the Order be indefinitely stayed merely upon the assertion of a cross demand. By Order entered October 2, 1986, Alta Ridge was awarded damages from FMA for the defense asserted by Alta Ridge of the claims asserted against Alta Ridge's title by Citizens Bank. Counsel for FMA later stipulated that the attorney's fees in the amount of \$50,022.15 were reasonable. Alta Ridge's liquidated judgment should not be indefinitely stayed based upon contingent crossclaims of FMA.

Finally, FMA's Notice of Appeal was filed 34 days after the entry of the Order and was not timely. Counsel for FMA was put on notice that the Order had been submitted to the Court and should have monitored the date of the entry of that Order. FMA's failure to file its Notice of Appeal within the 30 day period allowed by the Rules is jurisdictional, warranting

dismissal of the appeal.

## ARGUMENT

### I

#### A. FMA BREACHED ITS DEED WARRANTIES BY CAUSING OR SUFFERING THE 4-SEASONS TRUST DEED TO BE AN ENCUMBRANCE AGAINST THE PROPERTY.

FMA contends it did not breach any deed warranties because the property was conveyed by Special Warranty Deed pursuant to which FMA warranted against "all claiming by, through or under it to Alta Ridge Associates" (Ex. 12). The Utah statutory scheme provides short forms only for quit claim and warranty deeds. Utah Code Ann. Sections 57-1-12 and 13. Special warranty deeds are not specifically included within the statutory scheme.

Case law noted by FMA from other jurisdictions has held that a special warranty deed normally warrants title against claims held by, through or under the grantor, meaning encumbrances created, suffered or made by the grantor. Central Life Assur. Soc. v. Impelmans, 13 Wash. 2d 632, 126 P.2d 757 (1942); Stracka v. Peterson, 377 N.W.2d 528 (N. Dak. 1985). An encumbrance "suffered" by a party means an encumbrance within his power and duty to have avoided. Smith v. Eigerman, 5 Ind. App. 269, 31 N.E. 862 (1892) ("Suffered" in that connection implies reasonable control).

In this case, the jury found, a finding affirmed by this Court on appeal (Add. 39), that FMA intended to merge its

first trust deed position into the Quit Claim Deed it subsequently took from Morgan (R. 843-844, Add. 37-38). As a result of this merger, FMA's first position against the property was extinguished, leaving nothing to defeat the intervening liens, including the 4-Seasons Trust Deed. When a greater and lesser estate coincide and meet in the same person, the lesser estate merges into the greater and is extinguished. 2 Jones on Mortgages, Section 1080 at 508, 509 (1928); Aladdin Heating v. Trustees of Cent. States, 563 P.2d 82 (Nev. 1977). Thus, by its own actions, FMA allowed or suffered the Assignment of the 4-Seasons Trust Deed to continue as an encumbrance against the property. Clearly, it was within the reasonable control of FMA to foreclose its Trust Deed rather than accepting a Quit Claim Deed in lieu of foreclosure. But, having intentionally merged its Trust Deed, FMA caused or suffered the 4-Seasons Trust Deed to be an encumbrance, bringing it within the parameters of the warranties given by FMA.

Further, FMA caused or suffered the encumbrance as a result of its failure to properly record a lis pendens giving notice of its pending foreclosure action. Under Utah law, actions taken against real property are not effective against parties subsequently acquiring an interest in the property until a lis pendens has been properly recorded:

In any action affecting the title to, or the right of possession of, real property the plaintiff . . . may file for record with the recorder of the county in which

the property or some part thereof is situated a notice of the pendency of the action . . . . From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action . . . .

Utah Code Ann. Section 78-40-2. Failure to record a lis pendens as provided in this Section may allow a subsequent bona fide purchase or lienor without actual notice of the action to acquire an interest in the property which will not be extinguished by the foreclosure decree. Dupee v. Salt Lake Valley Loan & Trust Co., 20 Utah 105, 57 P. 845 (1899).

FMA, upon commencing its foreclosure, filed a Lis Pendens with the court but failed to have it recorded with the county recorder as required under the Utah Code (R. 1359). The assignment of the 4-Seasons Trust Deed was accomplished after the initiation of the FMA foreclosure action but prior to the entry of the Order of Foreclosure (Exs. 51 and 11; Add. 18-24). Had the Lis Pendens been recorded with the county recorder, Citizens Bank would have been bound by the terms of the Stipulation and Order of foreclosure. The Order of foreclosure entered pursuant to the stipulation of all parties to that action, including 4-Seasons, would have extinguished all liens against the property, leaving FMA, as the successful bidder at the foreclosure sale, with clear title to the property. Utah Code Ann. Section 78-37-3; Bagnall v. Suburbia Land Co., 579 P.2d 914 (Utah 1978) (Doctrine of lis pendens preserves the

status quo by keeping subject of lawsuit within control and power of court until judgment decree shall be entered and the recording of a lis pendens serves as warning to all persons that any rights or interest they may acquire in the interim are subject to the judgment or decree).

FMA's Special Warranty Deed, prepared by FMA (Tr. 1168, 1370), includes five certain exceptions. (Ex. 12; Add. 25-27). The 4-Seasons Trust Deed, however, is not one of the exceptions so listed. It is a basic principal that a contract is to be construed against the one who prepared it. Parks Enterprises, Inc. v. New Century Realty, Inc., 652 P.2d 918 (Utah 1982). Also, it is a fundamental principal of construction that the expression of certain items (the five itemized exceptions) excludes those items not expressed (the 4-Seasons Trust Deed). Cf, Orderville Irrigation Co. v. Glendale Irrigation Co., 17 Utah 2d 282, 409 P.2d 616 (1965) (Maxim used in statutory construction expressio unius est exclusio alterius, where one is expressed others are excluded). Finally, by analogy to the warranty deed statute, Utah Code Ann. Section 57-1-12, any exceptions to the covenants are to be inserted in the deed.

In an Addendum accepted by FMA, FMA agreed to "complete the foreclosure action presently pending against the subject property . . . ." (Ex. 43, Add. 9-11). David Klomp, the then in house counsel for FMA testified in his deposition that the sale of the property was contingent on completing a "successful

foreclosure." (David Klomp Deposition pp. 36 and 38).<sup>2</sup>

Thus, FMA's actions and failures to act as noted above caused or suffered the 4-Seasons Trust Deed to remain as an encumbrance against the property.

B. THE FORECLOSURE ACTION OF CITIZENS BANK  
CONSTITUTED CONSTRUCTIVE EVICTION AND  
BREACHED DEED WARRANTIES GIVEN BY FMA.

FMA argues there was no breach of the deed warranty against encumbrances because Alta Ridge was not actually evicted from the property. In the case of Christiansen v. Utah-Idaho Sugar Co., 590 P.2d 1251 (Utah 1979), this Court found that in an action for breach of covenant of warranties or against encumbrances an eviction, either actual or constructive, may be shown.<sup>3</sup>

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<sup>2</sup>Although David Klomp's deposition was published for the purposes of the Motion for Summary Judgment filed by Fidelity (R. 1607), it was not indexed as part of the record. Fidelity will be filing a Motion to Supplement the Record to include his deposition. Additionally, the trial court's award of attorney's fees is sustainable as a result of FMA's breach of this express condition of the Addendum. Lines 47 and 48 of the Earnest Money, although not legible as a result of photocopying and reduction, provide either party

agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee. (Ex. 43; Add. 9-11).

The 4-Seasons Trust Deed was not extinguished, accordingly, the foreclosure was not successfully completed and Alta Ridge is also entitled to its attorney's fees under this provision of the Earnest Money.

<sup>3</sup>The Utah-Idaho case deals specifically with a breach of covenant of warranty or against encumbrances. It does not deal with the question of a breach of the warranty of quiet enjoy-



An actual eviction occurs if there has been a removal of the vendee from the premises, a failure to obtain possession under his deed, a surrender of possession after a hostile assertion of a paramount title or a purchase or extinction of such title by the vendee. Wilder v. Wilhite, 190 Kan. 564, 376 P.2d 797 (1962). (Emphasis added.) Constructive eviction exists if the adverse title is so asserted that the buyer must yield to it or be dispossessed of the land. See, e.g., East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 65 Utah 560, 238 P. 280 (1925) (Allegation of grantee that fee simple title was not in grantor sufficient to constitute eviction); George A. Lowe Co. v. Simmons Warehouse Co., 39 Utah 395, 117 P. 874 (1911) (Grantee, in order to protect title warranted by grantor not required to wait until property exposed to sale or grantee evicted, but may pay taxes to protect title); Chicago Mobile Dev. Co. v. G. C. Coggin Co., 66 So.2d 151 (Ala. 1953) (A covenant against encumbrances is broken immediately upon making the covenant where an undisclosed lease is outstanding although there has been no ouster by lessee and there is no interference with possession and use of land by owner); Camden County Welfare Bd. v. Federal Dep. Ins. Co., 1 N.J. Super. 532, 62 A.2d 416 (1948) (Issuance of execution by a

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ment and possession or other deed warranties such as the covenant of seisin, and the covenant to warrant and defend title. In this case, the trial court found that FMA had breached the deed warranties in general. (R. 1592-96)

judgment creditor on a judgment against a former owner of a premises constituted a lien on the premises and the judgment creditor's threat to continue to attempt to satisfy its debt through issuance in the future, even though the present execution was void, constituted a constructive eviction of the grantee under a deed containing a covenant of general warranty); McCleary v. Bratton, 307 S.W.2d 722 (Mo. App. 1957) (Where third party drove stakes on a portion of land conveyed to the buyer and ordered the buyer off the land, and employed an attorney who notified the buyer to quit interfering with the third party's use of the land or otherwise he would bring legal proceedings against the buyer, such acts were sufficient to show constructive eviction).

FMA failed in its opening Brief to deal with various deed warranties other than that against encumbrances. Under the case law, the foreclosure action of Citizens Bank breached FMA's warranties of quiet enjoyment and possession, seisin and the covenant to warrant and defend title. In Creason v. Peterson, 470 P.2d 403 (Utah 1970), this court found that a deed warranty of quiet enjoyment and seisin was breached when it was shown the grantor did not have good title to the property he purported to convey, stating:

Defendant's argument . . . is that there was no breach of warranty because the plaintiffs had peaceable possession and enjoyment of the property without any eviction or threat thereof. With this we do not agree. . . . [T]he grantee is

entitled to the peaceable possession and enjoyment of the property he purchases in accordance with the warranties . . . [and] to the damage he suffers as a result of the breach thereof, but this includes taking such measures as are reasonable and necessary to clear up any difficulty which would represent a substantial flaw in its title.

(Emphasis added.) Id. at 404. For cases dealing with the covenant to warrant and defend, see Van Cott v. Jacklin, 63 Utah 412, 226 P. 460 (1924) (Attorney's fees recoverable as damages against grantor when fees incurred by grantee in defending title) and Sartin v. Huguen, 7 P.2d 151, 153 (Okla. 1932) (Buyer entitled to recover attorney's fees to defend action even where seller eventually pays claim since under the provisions of "common justice between man and man, the defendant ought to pay the plaintiff for the amount expended by the plaintiff in good faith in an effort to protect the property he has purchased from the defendant from the lien claim of Fisher & Son.")

Here, Citizens Bank not only asserted its title was paramount to that of Alta Ridge, but it also commenced foreclosure proceedings and was only restrained from conducting the sale of the property by the commencement of this action and the issuance of a temporary restraining order one day prior to the scheduled sale. (R. 37-42) Such actions by Citizens Bank constitute a constructive eviction of Alta Ridge sufficient to allow Alta Ridge to recover against FMA for breach of its deed

warranty against encumbrances.

The end result of Alta Ridge's lawsuit was the extinction of Citizens Bank's claim. If the law is as FMA asserts, that claims ultimately determined to be invalid are not lawful claims within the scope of deed warranties, in actions where the validity of an adverse title is contested, it would behoove the grantor to refuse to defend the action, gambling that his grantee will prevail after bearing the expense of the litigation proving the claim invalid, thus costing the grantor no out of pocket expense -- an unfair result. See, MacKenzie v. Clement, 144 Mo. App. 114, 129 S.W. 730 (1910) (An outstanding legal title is within a covenant of warranty against lawful claims and if asserted is a lawful claim though an eviction may be avoided by showing a superior equity); Lex deficere non potest in justitia exhibenda, the law ought not to fail in dispensing justice.

## POINT II

### FIDELITY AS THE INSURER OF ALTA RIDGE IS ENTITLED TO RECOVER THE ATTORNEY'S FEES AWARDED UNDER THE BREACH OF DEED WARRANTIES.

An insurer is subrogated to the right of its insured by the terms of the insurance policy or on the ground of general equitable principles. Insurance Co. of N. Am. v. St. Farm Mut. Auto. Ins., 663 P.2d 953 (Alaska 1983). In general, under the doctrine of subrogation, an insurer is entitled to step into the shoes of its insured and recoup its losses from the third

party who caused the loss. Board of Educ. v. Hales, 566 P.2d 1246 (Utah 1977). A property insurer who has indemnified an insured is subrogated to any rights the insured may have against a third party who is responsible for the loss. Skauge v. Mountain States Tel. & Tel., 172 Mont. 521, 565 P.2d 628 (1977).

Pursuant to paragraph 11 of the title insurance policy:

Whenever the Company [Fidelity] shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such a right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. . . .

(Emphasis added). In its Brief, FMA argues Fidelity is not subrogated to Alta Ridge's rights to recover attorney's fees for breach of the deed warranties on the basis that Fidelity did not pay or settle the Citizens Bank claim. The word "settle" is synonymous with the word "dispose" and signifies that a controversy has been adjusted, brought to an end and it may include a determination on the merits. Yancey v. Yancey, 230 N.C. 719, 55 S.E.2d 468, 69 (1949); United States v. The Brazil, 134 F.2d 929 (7th Cir. 1943). By preventing the

foreclosure of Citizens Bank and obtaining a final determination that the claim of Citizens Bank was invalid, Fidelity "settled" that claim within the meaning of the policy.

The case of Federal Sav. & Loan Ins. Corp. v. Huff, 237 Kan. 873; 704 P.2d 372 (1985) cited by FMA for the proposition that subrogation is inapplicable until a debt has actually been paid is a case dealing with equitable subrogation and not with the specific terms of an insurance policy. Commercial Union Ins. Co. v. Postin, 610 P.2d 984 (Wyo. 1980), also cited by FMA, recognizes the principle that an insurer has a right to recover damages it is obligated to pay under its policy of insurance. Here, Fidelity was obligated to pay pursuant to paragraphs 3 and 6 of the policy all costs and attorney's fees for the defense of any claim adverse to the title of its insured. Those costs and attorney's fees were, in fact, paid by Fidelity on behalf of Alta Ridge Associates.

Further, the policy of title insurance (Ex. 13; Add. 28-36) specifically provides in paragraph 3(e):

In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and commit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding in effecting settlement, securing evidence, obtaining witnesses or prosecuting or

defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

By letter dated December 22, 1982, counsel for Fidelity obtained from Edward James, the president of Alta Ridge, the right to proceed in this action in the name of Alta Ridge, confirming that Parsons & Crowther was undertaking the representation of Alta Ridge Associates in the above referenced matter. (Ex. 1 in hearing on Fidelity's Motion for Award of Attorney's Fees and FMA's Motion to Reconsider Award of Potential Summary Judgment, Add. 40). A copy of that letter was mailed to then counsel for FMA, Milo Marsden and to its in-house attorney, Bob Gross. FMA made no objection to the manner by which Fidelity proposed to proceed in the name of its insured in this litigation until long after the claim against Citizens Bank had been resolved by the jury. It was only after the trial court found liability against FMA on the issue of the deed warranties that FMA raised its objection. Having allowed Fidelity to proceed and having waited so long to object, FMA should be equitably estopped from raising the issue now. Brixen & Christopher, Arch v. Elton, 777 P.2d 1039 (Utah App. 1989) (Equitable estoppel precludes parties from asserting rights where their actions render it inequitable to allow them to assert those rights).

FMA would have Alta Ridge be billed for and pay the attorney's fees and then recover those fees from Fidelity.<sup>4</sup> Only then, according to FMA, could Fidelity recover against FMA having reimbursed its insured for a claim paid. Once again, the position asserted by FMA would yield an absurd result. Maxims of construction mandate the adoption of an interpretation which does not lead to an absurd result. Byrne v. Ackerlund, 108 Wash. 2d 445, 739 P.2d 1138 (1987) (Rational construction of contract prevails over a construction making the contract unreasonable). If a title company is not subrogated to the rights of its insured to recover for breach of deed warranties, it would be in the best interest of a title company to refuse to defend the title of its insured, hoping instead its insured would do so and pay its own fees, thereby bearing the burden of the defense.

In Transamerica Title Ins. Co. v. Johnson, 103 Wash. 2d 409, 693 P.2d 697 (1985), a title insurance company brought an action against the vendor under the policy's subrogation provision to recover sewer assessment liens which the insurer had paid on behalf of the insured. The Washington court allowed the title insurance company to recover from the vendor even though the title insurance company was negligent in failing to disclose the sewer assessments on the preliminary

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<sup>4</sup>On behalf of Alta Ridge, Fidelity paid the attorney's fees incurred for the representation.



commitment for title insurance. The court reasoned that the vendor was fully aware of the existence of the assessment before the title insurance company ever issued its preliminary commitment and had the assessments been disclosed the vendor would have had to pay them from the closing proceeds. The court held the vendor could not use the negligence of the title company to avoid its contractual obligations to convey title free of encumbrances.

Similarly, in the instant case, FMA was fully aware of the 4-Seasons Trust Deed prior to the issuance of a preliminary commitment. It instituted a foreclosure action to clear the title and executed the Addendum making the sale of the property conditioned upon the successful completion of the then pending foreclosure action. (Ex. 43; Add. 10; Depo. of David Klomp, pp. 36 & 38). FMA was thus contractually bound under the Addendum to successfully complete its foreclosure action, extinguishing the 4-Seasons Trust Deed among others. If FMA could not clear the 4-Seasons Trust Deed from the title, it would have had to pay the \$42,000.00 encumbrance from the closing proceeds and convey title without this encumbrance, as it contractually agreed to do.<sup>5</sup> Accordingly, as in the Trans-

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<sup>5</sup>In fact, the preliminary title report prepared by Alta Title disclosed the existence of the 4-Seasons Trust Deed. (Ex. 9). From the closing proceeds of the sale to Alta Ridge, \$42,000.00 was held in escrow and only later released by Alta Title Company upon receiving an indemnification from FMA for "any claim made by 4-Seasons Development and/or Ken Baxter in connection with the monies to be released." (David Klomp

america case, Fidelity is subrogated to the rights of Alta Ridge under the Special Warranty Deed and is entitled to receive the attorney's fees for breach of those warranties.

### POINT III

#### FMA'S THIRD PARTY COMPLAINT DOES NOT PRECLUDE THE ENFORCEMENT OF THE ORDER.

Equitable relief from the enforcement of a judgment should not be granted merely on the ground that a party has a cross demand, but only on a showing that some injustice would result if execution is not stayed).<sup>6</sup> Palmquist v. Palmquist, 6 Utah 2d 294, 312 P.2d 779 (1957). Further, a party is entitled to have a judgment enforced once it has been properly entered and a court may not indefinitely stay execution on the judgment. Taylor National, Inc. v. Jensen Brothers Constr. Co., 641 P.2d 150 (Utah 1982); Ketchum Coal Co. v. Christiansen, 48 Utah 214, 159 P. 541 (1916). It should be noted that FMA's Third Party Complaint (R. 347-355) was filed on December 12, 1983. Over five years later, FMA has yet to take any steps to bring its Complaint to trial. Fidelity should not be required to wait indefinitely for the enforcement of its judgment.

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Deposition; Ex. 9).

<sup>6</sup>As a result of the affirmance of the jury verdict preventing the enforcement of the 4-Seasons Trust Deed against the property, FMA has not incurred any actual damages. FMA, therefore, has no recovery against which the Order awarded to Alta Ridge can be offset.

Finally, FMA's Third Party Complaint is founded primarily in negligence, and FMA's damages, if any, are unliquidated or uncertain at this point in time. In the absence of a statutory provision specifically providing therefor, unliquidated damages cannot be set off in an action at law. Nutter v. Occidental Petroleum Land and Dev. Corp., 117 Ariz. 548, 573 P.2d 532 (1977) (Neither interrelationship of mortgage foreclosure action which action defendants brought against the plaintiffs in another county for alleged breach of a subordination agreement, nor plaintiff's inequitable behavior as alleged in action pending in other county gave rise to a special equity in defendants' favor so as to allow them to set off a personal demand for unliquidated damages against the mortgage debt).

#### POINT IV

##### FMA'S APPEAL IS NOT TIMELY.

A notice of appeal is required to "be filed with the Clerk of the District Court within thirty days after the date of the entry of the judgment or order appealed from." Rule 4, Rules of the Utah Supreme Court. Failure to timely perfect an appeal is a jurisdictional failure which requires dismissal of the appeal. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984). A judgment or order is complete and deemed entered for all purposes when it is signed and filed with the Clerk of the Court in which the judgment was rendered. Utah R. Civ. P., Rule 58A(c).

As more extensively set forth in Fidelity's Memorandum of Points and Authorities in support of its Motion for Summary Disposition filed with this Court, FMA's Notice of Appeal relative to the Motion for an Award of Attorney's Fees was not timely filed, being filed 34 days after the entry of the Order by the trial court. The proposed Order was mailed to counsel for FMA, who then requested a name change relating to FMA's successors in interest. The change was made and the Order, as changed, was served upon the attorney for FMA as required under Rule 5-504(2), Utah Rules of Judicial Administration by mailing him a copy of the Order at his known address together with a carbon copy of the cover letter transmitting the Order, putting him on notice that the Order had been submitted to the trial Court for signature. Although counsel for FMA acknowledged receiving the letter transmitting the Order to the lower court, he filed no objections to the form of the Order within the five day period allowed in Rule 5-504(2) indicating he knew the Order had been submitted and approved of it as submitted. The Order was subsequently entered and filed by the trial court seven days after it was submitted.

In Marsh v. Utah Homes, Inc. 17 Utah 2d 248, 408 P.2d 906 (1965) this Court held that the mailing of a copy of a judgment by the plaintiff to the defendant on the day before it was entered constituted sufficient notice to commence the running of an appeals period inasmuch as a proper inquiry by the

defendant's counsel would have disclosed the actual fact that the judgment had been entered. Cf. Goddard v. Bundy, 121 Utah 2d 299, 241 P.2d 264 (1952) (ten day period within which to file motions for amendment and new trial begins when judgment signed and filed not when notice received by parties). Accordingly, the time within which to file FMA's notice of appeal commenced running on March 31, 1989 and expired on May 1, 1989. The Notice of Appeal filed on May 4, 1989 was untimely and the appeal should be dismissed.

#### CONCLUSION

The 4-Seasons Trust Deed came within the scope of the Special Warranty Deed since FMA caused or suffered the encumbrance during its ownership of the property. Fidelity is subrogated under the policy of title insurance to the rights of Alta Ridge to recover its attorney's fees for the breach of the Special Warranty Deed. The mere existence of a claim by FMA against Fidelity does not prevent the enforcement of Fidelity's Order. Finally, FMA's appeal of that is untimely. Accordingly, the Judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of February, 1990.

WINDER & HASLAM, P.C.

By Donald J. Winder  
Donald J. Winder

By Kathy A. F. Davis  
Kathy A. F. Davis  
Attorneys for Fidelity National  
Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that, on the 15 day of February, 1990, I caused ten true and correct copies of the foregoing Brief of Respondent Fidelity National Title Insurance Company to be mailed, first class, postage prepaid, to the Clerk of the Utah Supreme Court, 332 State Capitol Building, Salt Lake City, Utah 84114, and four true and correct copies to be mailed, first class, postage prepaid, to Stewart M. Hanson, Esq. and Charles P. Sampson, Esq., SUITTER, AXLAND, ARMSTRONG & HANSON, 700 Clark Leaming Office Center, 175 South West Temple, Salt Lake City, Utah 84101-1480.

Kathy A. F. Davis

WHEN RECORDED, MAIL TO:

Recorded MAR 20 1978 at 12:36 PM  
Request of Utah Title & Abstract Company  
KATIE L. DIXON, Recorder  
Salt Lake County, Utah  
By Cheryl Warrington Deputy  
REF. \_\_\_\_\_  
Space Above This Line For Recorder's Use

3079916

TRUST DEED

With Assignment of Rents

EXHIBIT 3

THIS TRUST DEED, made this 8th day of March, 1978  
between Dale H. Morgan

\_\_\_\_\_, as TRUSTOR,  
whose address is 6679 South 2445 East Salt Lake City Utah  
(Street and number) (City) (State)

Milo S. Marsden, Jr., as TRUSTEE,\* and

FMA Leasing Company, as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,  
WITH POWER OF SALE, the following described property, situated in Salt Lake  
County, State of Utah:

*Property Description per the attached Exhibit A of one page  
which by reference to is made a part hereof.*

*Property located at the mouth of Little Cottonwood Canyon, Sandy, Utah.*

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ 304,500.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

\*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

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TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES.

1. To keep said property in good condition and repair; not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law, to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.



15 After the lapse of such time as may then be required by law following the recordation of said notice of default and notice of default and notice of sale having been given as then required by law Trustee without demand on Trustor shall sell said property on the date and at the time and place designated in said notice of sale either as a whole or in separate parcels and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property if consisting of several known lots or parcels shall be sold) at public auction to the highest bidder the purchase price payable in lawful money of the United States at the time of sale The person conducting the sale may for any cause he deems expedient postpone the sale from time to time until it shall be completed and in every case notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale provided if the sale is postponed for longer than one day beyond the day designated in the notice of sale notice thereof shall be given in the same manner as the original notice of sale Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold but without any covenant or warranty express or implied The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof Any person including Beneficiary, may bid at the sale Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale including the payment of the Trustee's and attorney's fees, (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed (3) all sums expended under the terms hereof, not then repaid with accrued interest at 10% per annum from date of expenditure (4) all other sums then secured hereby and (5) the remainder if any to the person or persons legally entitled thereto or the Trustee in its discretion may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place

16 Upon the occurrence of any default hereunder Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

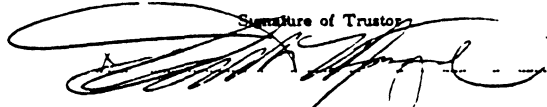
17 Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated a substitution of trustee From the time the substitution is filed for record the new trustee shall succeed to all the powers duties authority and title of the trustee named herein or of any successor trustee Each such substitution shall be executed and acknowledged and notice thereof shall be given and proof thereof made in the manner provided by law

18 This Trust Deed shall apply to inure to the benefit of and bind all parties hereto their heirs legatees devisees administrators executors successors and assigns All obligations of Trustor hereunder are joint and several The term Beneficiary shall mean the owner and holder including any pledgee of the note secured hereby In this Trust Deed whenever the context requires the masculine gender includes the feminine and/or neuter and the singular number includes the plural

19 Trustee accepts this Trust when this Trust Deed duly executed and acknowledged is made a public record as provided by law Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor Beneficiary or Trustee shall be a party unless brought by Trustee

20 This Trust Deed shall be construed according to the laws of the State of Utah

21 The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth

Signature of Trustor  


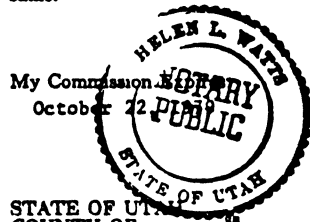
(If Trustor an Individual)


STATE OF UTAH  
COUNTY OF SALT LAKE ss.

On the 8th day of March, A D 19 78, personally

appeared before me Dale H. Morgan

the signer(s) of the above instrument, who duly acknowledged to me that he executed the same.



  
Notary Public residing at  
Salt Lake City, Utah

(If Trustor a Corporation)

STATE OF UTAH  
COUNTY OF ss.

On the day of, A D 19, personally

appeared before me who being by me duly sworn,

says that he is the of  
the corporation that executed the above and foregoing instrument and that said instrument was  
signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution  
of its board of directors) and said acknowledged  
to me that said corporation executed the same.

Notary Public reading at

My Commission Expires:

BOOK 4641 PAGE 355

## EXHIBIT A

THIS EXHIBIT A is attached to and forms a part of the Trust Deed dated March, 1978, by and between Dale H. Morgan, as Trustor, Milo S. Marsden, Jr., as Trustee, and FMA Leasing Company, as Beneficiary.

## Property Description:

## Parcel I

BEGINNING on the South line of the South fork of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, said point being 423 feet, more or less, South from the West quarter of said section, and running thence South along said West line 897 feet, more or less, to South line of the Northwest quarter of the Southwest quarter; thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less; thence South  $03^{\circ}04'$  East 417.42 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $87^{\circ}53'$  West 164.94 feet; thence North  $60^{\circ}30'16''$  West 109.04 feet; thence North  $58^{\circ}33'18''$  West 144.21 feet; thence North  $66^{\circ}15'14''$  West 197.97 feet; thence Northeasterly along Westerly line of Joseph P. Sturdy property to the South line of Little Cottonwood Road; thence Southwesterly along said South line of road to the point of BEGINNING.

## Parcel II

BEGINNING at a point 151.46 feet South, 1162.3 feet East and North  $85^{\circ}47'$  East 178.14 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the South line of said road 100 feet, more or less, to the West line of W. Douglas Shewmaker property; thence South along said West line 1200 feet, more or less, to the South line of Grantor's property; thence West 100 feet, more or less, to a point due South of the point of beginning; thence North 1190.9 feet, more or less, to the point of BEGINNING.

## Parcel III

BEGINNING 151.93 feet South, and 1153.94 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian and running thence along the Southerly line of Little Cottonwood Road North  $85^{\circ}47'$  East 184.53 feet, thence South 1190.90 feet, thence North  $89^{\circ}36'15''$  West 184.04 feet, thence North 1176.06 feet to the point of BEGINNING.

## Parcel IV

BEGINNING at a point which is South  $53^{\circ}37'30''$  East 363.05 feet and North  $85^{\circ}47'$  East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, and running thence North  $85^{\circ}47'$  East 417.42 feet; thence South  $3^{\circ}04'$  East 417.42 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $3^{\circ}04'$  West 417.42 feet to the point of BEGINNING.

SUBJECT to a Right of Way over and across the following:

BEGINNING at a point which is South  $53^{\circ}37'30''$  East 363.05 feet and North  $85^{\circ}47'$  East 337.90 feet and South  $3^{\circ}04'$  East 196.21 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence North  $85^{\circ}47'$  East 392.42 feet; thence North  $3^{\circ}04'$  West 194.21 feet; thence North  $85^{\circ}47'$  East 25.0 feet; thence South  $3^{\circ}04'$  East 221.21 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $3^{\circ}04'$  West 25.0 feet to the point of BEGINNING.

Dale H. Morgan

BOOK 4641 PAGE 356

WHEN RECORDED MAIL TO

MAILED MAR 20 1978 EXHIBIT  
Request of Utah Title & Abstract Company  
KARLE L. DIXON Recorder  
Salt Lake County Utah  
\$ 700 By Cheryl Warrington Deputy  
REF. \_\_\_\_\_  
Space Above This Line for Recorder's Use

3079918

Trust Deed

T-45375

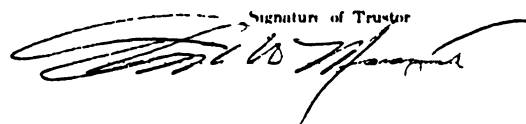
THIS TRUST DEED is made this 8th day of March, 1978,  
between DALE H. MORGAN, as Trustor,  
whose address is Salt Lake City, Utah  
(Street and Number) (City) (State)  
UTAH TITLE AND ABSTRACT COMPANY, as Trustee, and  
4-SEASONS DEVELOPMENT, INC., as Beneficiary  
Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER  
OF SALE, the following described property situated in Salt Lake County, Utah  
See Exhibit "A" attached hereto and by this reference made a part hereof.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto now or hereafter used or enjoyed with said property, or any part thereof.

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ 42,000.00, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any sums expended or advanced by Beneficiary to protect the security hereof

Trustor agrees to pay all taxes and assessments on the above property to pay all charges and assessments on water or water stock used on or with said property not to commit waste, to maintain adequate fire insurance on improvements on said property to pay all costs and expenses of collection (including Trustee's and attorney's fees in event of default in payment of the indebtedness secured hereby and to pay reasonable Trustee's fees for any of the services performed by Trustee hereunder including a reconveyance hereof

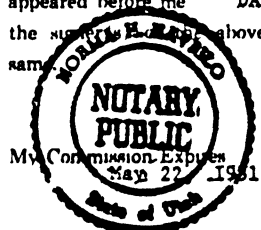
The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth

Signature of Trustor  


(If Trustor an Individual)

STATE OF UTAH  
COUNTY OF Salt Lake

On the 8th day of March A D 1978, personally  
appeared before me DALE H. MORGAN  
the subscriber above instrument, who duly acknowledged to me that he executed the same



  
Notary Public residing at.

Salt Lake City, Utah

UTAH TITLE AND ABSTRACT COMPANY

BOOK 4641 PAGE 360

EXHIBIT "A"  
LEGAL DESCRIPTION

Parcel I

BEGINNING on the South line of the South line of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, said point being 421 feet, more or less, South from the West quarter of said section, and running thence South along said West line 897 feet, more or less, to South line of the Northwest quarter of the Southwest quarter; thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less; thence South  $03^{\circ}05'$  East 517.42 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence South  $87^{\circ}51'$  West 184.96 feet; thence North  $60^{\circ}30'16''$  West 109.04 feet; thence North  $58^{\circ}33'18''$  West 144.21 feet; thence North  $66^{\circ}15'16''$  West 132.97 feet; thence Northeasterly along Westerly line of Joseph F. Sturdy property to the South line of Little Cottonwood Road; thence Southwesterly along said South line of road to the point of BEGINNING.

Parcel II

BEGINNING at a point 151.46 feet South, 116.13 feet East and North  $85^{\circ}47'$  East 178.15 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the South line of said road 100 feet, more or less, to the West line of W. Douglas Shewmaker property; thence South along said West line 1200 feet, more or less, to the Southline of Grantor's property; thence West 300 feet, more or less, to a point due South of the point of beginning; thence North 1190.9 feet, more or less, to the point of BEGINNING.

Parcel III

BEGINNING 151.93 feet South, and 1151.95 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian and running thence along the Southerly line of Little Cottonwood Road North  $85^{\circ}47'$  East 184.53 feet, thence South 1190.90 feet, thence North  $89^{\circ}36'15''$  West 134.04 feet, thence North 1176.06 feet to the point of BEGINNING.

Parcel IV

BEGINNING at a point which is South  $51^{\circ}17'30''$  East 363.05 feet and North  $85^{\circ}47'$  East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, and running thence North  $85^{\circ}47'$  East 417.42 feet; thence South  $3^{\circ}04'$  East 417.42 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $3^{\circ}04'$  West 417.42 feet to the point of BEGINNING.

SUBJECT to a Right of Way over and across the following:

BEGINNING at a point which is South  $51^{\circ}17'30''$  East 363.05 feet and North  $85^{\circ}47'$  East 337.90 feet and South  $3^{\circ}04'$  East 196.21 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence North  $85^{\circ}47'$  East 392.42 feet; thence North  $3^{\circ}04'$  West 194.21 feet; thence North  $85^{\circ}47'$  East 25.0 feet; thence South  $3^{\circ}04'$  East 221.21 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $3^{\circ}04'$  West 25.0 feet to the point of BEGINNING.

BOOK 4691 PAGE 361

EXHIBIT 6

Recorded at Request of FMA Leasing Company JUN 14 1978  
at 916A M. Fee Paid \$ 700 Kate L. Dixon, Salt Lake County Recorder  
by G. Schvaneveldt Dep. Book \_\_\_\_\_ Page \_\_\_\_\_ Ref.: \_\_\_\_\_  
Mail tax notice to FMA Leasing Company Address 2060 E. 2100 So.  
Salt Lake City, Utah 84108

## 3122936 QUIT-CLAIM DEED

Dale H. Morgan  
of Salt Lake City, County of Salt Lake, State of Utah, hereby  
QUIT-CLAIM to FMA Leasing Company  
2060 E. 2100 So. (P.O. Box 8311)  
Salt Lake City, Utah 84108

of Salt Lake City, Salt Lake County, Utah grantee  
for the sum of  
Three Hundred Forty Seven Thousand, One Hundred Thirty and no/100ths- DOLLARS,

the following described tracts of land in Salt Lake County,  
State of Utah:

Property Description per the attached Exhibit A of one page, which by  
reference to is made a part hereof.

Property located at the mouth of Little Cottonwood Canyon, Sandy, Utah

WITNESS the hand of said grantor, this Fifth day of  
June, A. D. one thousand nine hundred and Seventy-Eight

Signed in the presence of

[Signature]

[Signature]

STATE OF UTAH, } ss.  
County of Salt Lake

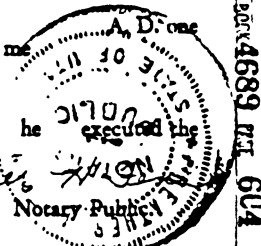
On the Fifth day of June  
thousand nine hundred and Seventy-Eight  
Dale H. Morgan

personally appeared before me

the signer of the foregoing instrument, who duly acknowledge to me that he executed the same.

My commission expires Oct. 6, 1981

Address: Salt Lake City, Utah



Parcel I

BEGINNING on the South line of the South fork of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, said point being 423 feet, more or less, South from the West quarter of said section, and running thence South along said West line 897 feet, more or less, to South line of the Northwest quarter of the Southwest quarter; thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less; thence South  $03^{\circ}04'$  East 417.42 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $87^{\circ}53'$  West 164.94 feet; thence North  $60^{\circ}30'16''$  West 109.04 feet; thence North  $58^{\circ}33'18''$  West 144.21 feet; thence North  $66^{\circ}15'14''$  West 187.97 feet; thence Northeasterly along Westerly line of Joseph P. Sturdy property to the South line of Little Cottonwood Road; thence Southwesterly along said South line of road to the point of BEGINNING.

Parcel II

BEGINNING at a point 151.46 feet South, 1162.3 feet East and North  $85^{\circ}47'$  East 178.14 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the South line of said road 100 feet, more or less, to the West line of W. Douglas Shewmaker property; thence South along said West line 1200 feet, more or less, to the South line of Grantor's property; thence West 100 feet, more or less, to a point due South of the point of beginning; thence North 1190.9 feet, more or less, to the point of BEGINNING.

Parcel III

BEGINNING 151.93 feet South, and 1153.94 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian and running thence along the Southerly line of Little Cottonwood Road North  $85^{\circ}47'$  East 184.53 feet, thence South 1190.90 feet, thence North  $89^{\circ}36'15''$  West 184.04 feet, thence North 1176.06 feet to the point of BEGINNING.

Parcel IV

BEGINNING at a point which is South  $53^{\circ}37'30''$  East 363.05 feet and North  $85^{\circ}47'$  East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, and running thence North  $85^{\circ}47'$  East 417.42 feet; thence South  $3^{\circ}04'$  East 417.42 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $3^{\circ}04'$  West 417.42 feet to the point of BEGINNING.

SUBJECT to a Right of Way over and across the following:

BEGINNING at a point which is South  $53^{\circ}37'30''$  East 363.05 feet and North  $85^{\circ}47'$  East 337.90 feet and South  $3^{\circ}04'$  East 196.21 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence North  $85^{\circ}47'$  East 392.42 feet; thence North  $3^{\circ}04'$  West 194.21 feet; thence North  $85^{\circ}47'$  East 25.0 feet; thence South  $3^{\circ}04'$  East 221.21 feet; thence South  $85^{\circ}47'$  West 417.42 feet; thence North  $3^{\circ}04'$  West 25.0 feet to the point of BEGINNING.

This Exhibit A is attached to and forms a part of the Quit-Claim Deed Dated June 5, 1978, 1978 by and between Dale H. Morgan as Grantor, and FMA Leasing Company as Grantee.

MC4689 MR 605

"THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEE A COMPETENT ADVICE."

# EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

Executive Management Inc. Salt Lake Sept 26 1979

1. The consideration of this contract is the offer to purchase the property of Executive Management Inc. 1,000.00 One Thousand DOLLARS

2. The type of Cash

3. The property and land is the property of the property located at: 3600 Little Cottonwood Road, Commonly known as  
Alta Via.

4. The location of the property is Salt Lake County State of Utah

5. The property is None

6. The following personal property shall be included as part of the property: All drawings, reports and designs.

7. The total purchase price of 1,000.00 four hundred and eighty thousand DOLLARS

8. The cash payment is 1,000.00 which represents the entire cash payment, receipt of which is hereby acknowledged by me:

9. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

10. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

11. Buyer shall give seller an interest-free promissory note for \$50,000 on January 30, 1980,

12. in order for this agreement to remain in force after the above time. Said note shall be due

13. and payable to seller on or before July 1, 1980.

14. Buyer shall surrender to seller, if buyer defaults on this agreement, all personal property

15. and all property rights pertaining to the Alta Via property, both on and off-site, including

16. water rights and developments owned by buyer or in his possession.

17. And the balance of 1 four hundred and eighty thousand DOLLARS, shall be paid by the buyer

18. in the form of cash or bank draft of 1,000.00 and the balance is 479,000.00 in the form of cash or bank draft of

19. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

20. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

21. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

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48. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

49. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

50. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

51. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

52. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

53. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

54. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

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57. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

58. The cash payment is 0 and the balance is 479,000.00 in the form of cash or bank draft of

APPROVED FORM - SECURITIES COMMISSION

A D D E N D U M

This Addendum is entered into this 2nd day of November, 1979 by and between FMA LEASING COMPANY, hereinafter "FMA", and ESTATE MANAGEMENT AND INVESTMENT CORP. and LANCOM, INC. to strike out paragraph No. 3 of that Agreement entered into on the 26th day of September, 1979 by and between the above named parties which states "Title is to be delivered in Fee Simple, excluding existing easements.", and to insert the following:

3. FMA will deliver title to Estate Management and Investment Corp. and Lancom, Inc., subject to the following:

A. FMA will complete the foreclosure action presently pending against the subject property in the Third Judicial District, Salt Lake County, State of Utah, Civil No. C79-4599, entitled "FMA Leasing Company vs. Dale H. Morgan, et al."

B. FMA will use all reasonable efforts to conclude the action timely.

C. FMA will bid at the Judicial Sale. At FMA's option, the bid amount will not exceed FMA's judgment, plus those out-of-pocket expenses necessitated by FMA's maintenance, upkeep, and repair of the subject property or its improvements thereto.

D. If FMA is high bidder at the Judicial Sale, FMA will convey all of its right, title and interest in and to the real property to Estate Management and Investment Corp. and Lancom, Inc. by Special Warranty Deed, subject only to taxes and utility easements.

DATED this 2nd day of November, 1979.

ESTATE MANAGEMENT AND INVESTMENT  
CORP.

By: [Signature]  
Its: [Signature]

LANCOM, INC.

By: [Signature]  
Its: [Signature]

FMA LEASING COMPANY

By: [Signature]  
Its: [Signature]



ADDENDUM

This Addendum is entered into this 23 day of September, 1980 by and between FMA Leasing Company, hereafter "FMA," and Estate Management and Investment Corp. and Lancom, Inc. to amend that Agreement entered into by and between the above-named parties on September 26, 1979, which relates to the sale of certain real property, more commonly referred to as the "Alta Via" property.

Line 17 of that Agreement shall be struck and the following shall be inserted: "The total purchase price of 488,640.94 Dollars . . . ."

All other terms and conditions of that Agreement, except for those amended by that Addendum of November 2, 1979, shall remain the same.

Estate Management and Investment Corp.

By: [Signature]

Its: President

Lancom, Inc.

By: [Signature]

Its: President

FMA Leasing Company

By: J. H. Lowe

Its: S. Vice Pres

EXHIBIT —

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

FEB 27 1991

*Richard A. Cappadona*  
Attorney for Defendants

DAVID F. KLOMP  
MARSDEN, ORTON & LILJENQUIST  
ATTORNEYS FOR PLAINTIFF  
63 SOUTH MAIN, FIFTH FLOOR  
SALT LAKE CITY, UTAH 84101  
TELEPHONE: (801) 521-3800

IN THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH

FMA LEASING COMPANY,  
Plaintiff,  
vs.  
DALE H. MORGAN; UTAH TITLE AND  
ABSTRACT COMPANY; THOMAS F.  
HERR and KAREN N. HERR;  
FOUR SEASONS DEVELOPMENT, INC.;  
THE LAND GROUP ENGINEERING,  
INC.; ENGINEERING CONSORTIUM;  
JOHN DOE I; JOHN DOE II;  
and JOHN DOE III,  
Defendants.

STIPULATION

Civil No. C79-4599

COME NOW FMA Leasing Company, hereinafter "FMA," by and through its attorney, David F. Klomp; Thomas F. Herr and Karen N. Herr, hereinafter "Herrs," by and through their attorney, Glen E. Davies; Utah Title & Abstract Company, hereinafter "Utah Title," by and through its attorney, Richard A. Cappadona; Four Seasons Development, hereinafter "Four Seasons," by and through its attorney, Neil R. Gabin; and the Land Group Engineering, Inc., hereinafter "Land Group," by and through its attorney, Kent L. Kasting; and stipulate and agree as follows:

1. This action involves a foreclosure of a Trust Deed on certain real property situate in Salt Lake County, State of Utah, and commonly known as the Alta Via Property, and more particularly described in Exhibit "A" attached hereto and incorporated herein by reference.

1           2. FMA has an interest in said property by virtue of a  
2 Trust Deed in the principal amount of \$304,500.00 dated the 8th  
3 day of March, 1978 and recorded March 20, 1978 as Entry No. 3079916  
4 Book 4641, Page 353. Said Trust Deed was executed by Dale H.  
5 Morgan and named FMA as beneficiary.

6           3. FMA also has an interest in the property by virtue of  
7 a Quit-Claim Deed dated the 5th day of June, 1978, executed by  
8 Dale H. Morgan as grantor and naming FMA as grantee. Said Quit-  
9 Claim Deed was recorded June 14, 1978 as Entry No. 3122936, Book  
10 4689, Page 604.

11           4. Herrs claim an interest in the property by virtue of a  
12 Trust Deed executed by Four Seasons Development, Inc., as Trustor,  
13 and naming Utah Title as trustee and Herrs as beneficiaries.  
14 Said Deed of Trust is in the principal amount of \$100,000.00,  
15 was dated March 8, 1978, and was recorded March 20, 1978 as  
16 Entry No. 3079917, Book 4641, Page 357.

17           5. Four Seasons claims an interest in the property by  
18 virtue of a Trust Deed executed by Dale H. Morgan as Trustor and  
19 naming Utah Title as trustee and Four Seasons as beneficiary.  
20 Said Trust Deed is dated the 8th day of March, 1978 and was  
21 recorded March 20, 1978 as Entry No. 3079918, Book 4641, Page 360.

22           6. Land Group claims an interest in the property by  
23 virtue of a Notice of Lien in the amount of \$6,125.97. The  
24 Notice of Lien is for engineering, architectural, and land  
25 planning services rendered in connection with the development of  
26 the property, which work commenced May 3, 1978 and concluded  
27 June 14, 1978. The Notice of Lien was recorded July 6, 1978 as  
28 Entry No. 3134241, Book 4792, Page 625.

29           7. Land Group may also claim an interest in the property  
30 by virtue of a second Notice of Lien in the amount of \$1,500.00.  
31 Said Notice of Lien was filed in connection with delinquency  
32 charges incurred by non-payment of services. It was recorded  
33 November 27, 1978 as Entry No. 3202800, Book 4777, Page 626.  
34

1 8. Utah Title claims no interest in the real property.

2 9. FMA has received an offer to purchase the property for  
3 the sum of \$480,000.00. This purchase price represents the fair  
4 market value of the property. The parties agree that FMA may  
5 sell the property for that price.

6 10. The order of priorities of the various parties'  
7 interests is as follows:

8 (a) FMA has a first security position on its Trust  
9 Deed for the principal amount thereof together with interest  
10 attorney fees, and expenditures made on the property to  
11 protect its security.

12 (b) Herrs have a second security position on their  
13 Trust Deed for the principal amount thereof together with  
14 interest and attorney fees.

15 (c) Four Seasons has a third security position on  
16 its Trust Deed for the principal thereof together with  
17 interest and attorney fees.

18 (d) Land Group has a fourth security position on its  
19 Notices of Lien.

20 11. The proceeds from the proposed sale shall be distribute  
21 as follows:

22 (a) All costs and expenses incurred in connection with  
23 the transfer shall be paid first.

24 (b) 11% shall then be paid the sum of \$441,541.84  
25 computed as follows:

26 Principal	\$304,500.00
27 Interest (to 9/9/80)	106,574.39
28 Improvements	21,967.45
29 Attorney fees	<u>3,509.00</u>
30 TOTAL	\$441,541.84

31 (c) The balance shall be paid to Herrs in partial pay-  
32 ment of their Trust Deed.  
33  
34

1 12. The property shall be sold free and clear of all claims  
2 by the parties and shall not be subject to any rights of redemp-  
3 tion which any of the parties may have.

4 DATED this 28 day of October, 1980.

5 MARSDEN, ORTON & LILJENQUIST

6  
7 By David F. Klomp  
8 David F. Klomp  
9 Attorney for FMA Leasing Co.

10 WATKISS & CAMPBELL

11  
12 By Glen E. Davies  
13 Glen E. Davies  
14 Attorneys for Thomas F. Herr  
15 and Karen N. Herr

16  
17 STRINGHAM, LARSEN, MAZURAN & SABIN

18  
19 By Neil Sabin  
20 Neil Sabin  
21 Attorney for Four Seasons  
22 Development, Inc.

23 COHNE, RAPPAPORT & SEGAL

24  
25 By Richard A. Rappaport  
26 Richard A. Rappaport  
27 Attorney for Utah Title & Abstract  
28 Co.

29 GUSTIN, ADAMS, KASTING & LIAPPIS

30  
31 By Kent M. Kasting  
32 Kent M. Kasting  
33 Attorney for The Land Group, Inc.

34  
35 STATE OF UTAH ) ss  
36 COUNTY OF SALT LAKE )

37 I, THE UNDERSIGNED, CLERK OF THE DISTRICT  
38 COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY  
39 CERTIFY THAT THE ANNEXED AND FOREGOING IS  
40 A TRUE AND FULL COPY OF AN ORIGINAL DOCU-  
41 MENT ON FILE IN MY OFFICE AS SUCH CLERK.

42 WITNESS MY HAND AND SEAL OF OFFICE  
43 THIS 28 DAY OF October, 1980  
44 H. D. [Signature]

PARCEL I:

BEGINNING on the South line of the South fork of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, said point being 423 feet, more or less, South from the West quarter of said Section, and running thence South along said West line 897 feet, more or less to South line of the Northwest quarter of the Southwest quarter; thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less; thence South 03°04' East 417.42 feet; thence South 35°47' West 417.42 feet; thence North 87°53' West 164.94 feet; thence North 60°30'16" West 109.04 feet; thence North 58°13'18" West 144.21 feet; thence North 66°15'14" West 187.97 feet; thence Northeasterly along Westerly line of Joseph F. Sturdy property to the South line of Little Cottonwood road; thence Southwesterly along said South line of road to the point of BEGINNING.

PARCEL II:

BEGINNING at a point 151.46 feet South, 1162.3 feet East and North 85°47' East 178.15 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the Southline of said road 100 feet, more or less, to the West line of W. Douglas Sheemaker property; thence South along said West line 1200 feet, more or less, to the Southline of Grantor's property; thence West 100 feet, more or less, to a point due South of the point of beginning; thence North 1190.9 feet more or less, to the point of BEGINNING.

PARCEL III:

BEGINNING 151.93 feet South, and 1153.94 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian and running thence along the Southerly line of Little Cottonwood Road North 85°47' East 184.53 feet, thence South 1190.90 feet, thence North 89°35'15" West 134.04 feet, thence North 1176.06 feet to the point of BEGINNING.

PARCEL IV:

BEGINNING at a point which is South 53°37'30" East 363.05 feet and North 85°47' East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, and running thence North 85°47' East 417.42 feet; thence South 3°04' West 417.42 feet; thence South 85°47' West 417.42 feet; thence North 3°04' West 417.42 feet to the point of BEGINNING.

Subject to the following:

1. Any and all taxes of any nature.
2. Any charges and assessments of the Salt Lake County Cottonwood Sanitary District within which the property is included.
3. Any charges and assessments of Salt Lake County Special District No. 1.
4. The right of Salt Lake County to reassess the Tax Assessment on said property in accordance with Sections 59-5-86 to 105, Utah Code Annotated, 1953, as disclosed by that certain Annual Application for Assessment and Taxation of Agricultural Land 1969 Farmland Assessment Act dated October 15, 1975 and recorded October 15, 1975 as Entry No. 2751362 in Book 3998 at page 254 of Official Records.
5. Any and all utility or irrigation easements including the following:
  - a. An Easement in favor of Utah Power and Light Company dated May 19, 1961 and recorded August 9, 1961 as Entry No. 1793162, Book 1829, page 458.
  - b. An Easement in favor of Utah Power & Light Company dated August 7, 1962 and recorded as Entry No. 1878407, Book 1930, page 436.
  - c. An Easement in favor of the South Despain Ditch Company and/or the Utah Water and Power Board dated July 1, 1963 and recorded December 13, 1963 as Entry No. 1966010, Book 2133, page 253.

~~WILLIAM W~~ NSON  
95 WEST NORTH TEMPLE  
SALT LAKE CITY UT 84103  
7812

EXHIBIT 51

ASSIGNMENT OF DEED OF TRUST  
AND  
TRUST DEED NOTE  
(For Security)

3533574

REC-11  
FEB 13 5 33 AM '81  
CITIZENS BANK  
SALT LAKE CITY

THIS AGREEMENT made in the City of Salt Lake, State of Utah, on the 10th day of February, 1981, by and between 4-Seasons Development, Inc. hereinafter referred to as the Assignors; and The Citizens Bank, and hereinafter referred to as the Assignees,

WITNESSETH:

WHEREAS, under date of March 8, 1978, 4-Seasons Development, Inc., Beneficiary, entered into a Trust Deed Note and Deed of Trust with Dale Morgan as Trustor, which Trust Deed Note and Deed of Trust is delivered herewith concerning property being in the county of Salt Lake, State of Utah, and more particularly described as follows:

See Attached Exhibit "A"

to which agreement in writing, reference is hereby made for all of the terms, conditions and provisions thereof, and

WHEREAS, the Assignees desire to acquire from the Assignors all of the right, title and interest of the Assignors in and to the said written agreements.

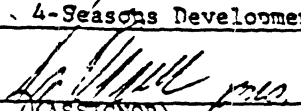
NOW, THEREFORE, it is hereby mutually agreed as follows:

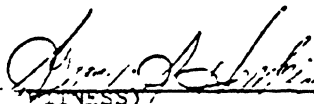
1. That the Assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, assign to the Assignees, all their right, title and interest in and to the aforesaid Deed of Trust and Trust Deed Note of March 8, 1978, concerning the above described property.
2. That to induce the Assignees to pay the said sum of money and to accept the said contract, the Assignors hereby represent to the Assignees as follows:
  - a. That the Trust Deed Note is now in full force and effect and that the unpaid balance of said Note is \$42,000, with interest owing from March 8, 1978 at 8%.
  - b. That said Deed of Trust and Trust Deed Note are assignable.

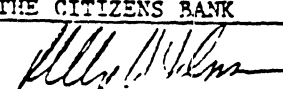
THIS ASSIGNMENT is given for the purpose of securing payment of the indebtedness evidenced by a Promissory Note of even date herewith, in the principal sum of \$42,000 made by the Assignor, payable to the order of the Assignee at the times in the manner and with interest as therein set forth.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and year first above written.

  
(WITNESS)

4-Seasons Development, Inc.  
  
(ASSIGNOR)

  
(WITNESS)

THE CITIZENS BANK  
  
(ASSIGNEE) via President



PARCEL 1

Exhibit "A"

279.11  
BEGINNING on the South line of the South fork of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being 423 feet, more or less, South from the West quarter of said section, and running thence South along said West line 897 feet, more or less, to South line of the Northwest quarter of the Southwest quarter, thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less, thence South 03°04' East 417.42 feet, thence South 85°47' West 417.42 feet, thence North 87°53' West 164.94 feet; thence North 60°30'16" West 109.04 feet; thence North 58°33'18" West 144.21 feet; thence North 66°15'14" West 187.97 feet; thence Northeasterly along Westerly line of Joseph F. Sturdy property to the South line of Little Cottonwood Road; thence Southwesterly along said South line of road to the point of BEGINNING.

PARCEL 2

279.31  
BEGINNING at a point 151.46 feet South, 1162.3 feet East and North 85°47' East 178.14 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the South line of said road 100 feet, more or less, to the West line of W. Douglas Shoemaker property; thence South along said West line 1200 feet, more or less, to the South line of Grantor's property; thence West 100 feet, more or less, to a point due South of the point of beginning, thence North 1190.9 feet, more or less, to the point of BEGINNING.

PARCEL 3

279.11  
BEGINNING 151.93 feet South, and 1153.94 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian and running thence along the Southerly line of Little Cottonwood Road North 85°47' East 184.53 feet; thence South 1190.90 feet, thence North 89°36'15" West 184.04 feet, thence North 1176.06 feet to the point of BEGINNING.

PARCEL 4

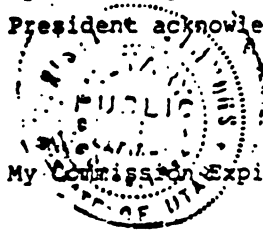
279.11  
BEGINNING at a point which is South 53°37'30" East 363.05 feet and North 85°47' East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 85°47' East 417.42 feet; thence South 3°04' East 417.42 feet; thence South 85°47' West 417.42 feet; thence North 3°04' West 417.42 feet to the point of BEGINNING.

SUBJECT to a Right of Way over and across the following:

279.11  
BEGINNING at a point which is South 53°37'30" East 363.05 feet and North 85°47' East 337.90 feet and South 3°04' East 196.21 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 85°47' East 392.42 feet; thence North 3°04' West 194.21 feet, thence North 85°47' East 25.0 feet; thence South 3°04' East 221.21 feet, thence South 85°47' West 417.42 feet; thence North 3°04' West 25.0 feet to the point of BEGINNING.

BOOK 5212 PAGE 1128

On the 10th day of February, A.D. 1981, personally appeared before me Ken Baster, who being be me duly sworn, says that he is the President of 4-Seasons Development Inc. the corporation that executed the above and foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution of its board of directors) and said President acknowledged to me that said corporation executed the same.

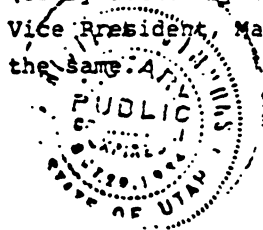


My Commission Expires:

Christina Summers  
Notary Public

RESIDING AT: WEST JORDAN, UTAH  
MY COMMISSION EXPIRES: 10-23-84

On the 10th day of February , A.D.1981, personally appeared before me Phillip W Johnson, who beingby meduly sworn, says that he is the Vice President, Manager of The Citizens Bank, the corporation that executed the above and foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution of its board of directors) and said Vice President, Manager acknowledged to me that said corporation executed the same.



My Commission Expires:

Christina Summers  
Notary Public

RESIDING AT: WEST JORDAN, UTAH  
MY COMMISSION EXPIRES: 10-23-84

EXHIBIT //

DAVID F. KLUMP  
MARSDEN, ORTON & LILJENQUIST  
ATTORNEYS FOR PLAINTIFF  
68 SOUTH MAIN, FIFTH FLOOR  
SALT LAKE CITY, UTAH 84101  
TELEPHONE: (801) 521-3300

FEB 27 1981

*For the Court*

IN THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH

FMA LEASING COMPANY,  
Plaintiff,  
vs.  
DALE H. MORGAN; UTAH TITLE AND  
ABSTRACT COMPANY; THOMAS F.  
HERR and KAREN N. HERR;  
FOUR SEASONS DEVELOPMENT, INC.;  
THE LAND GROUP ENGINEERING,  
INC.; ENGINEERING CONSORTIUM;  
JOHN DOE I; JOHN DOE II;  
and JOHN DOE III,  
Defendants.

ORDER

Civil No. C79-4599

Based upon the Stipulation of the parties and good cause  
appearing therefor,

IT IS HEREBY ORDERED:

1. That the property commonly known as the Alta Via Pro-  
perty situate in Salt Lake County, State of Utah, more fully des-  
cribed in Exhibit "A" attached hereto and incorporated herein by  
reference, be sold by FMA Leasing Company for the sum of  
\$480,000.00.

2. That the proceeds from the sale be distributed as  
follows:

(a) That the costs and expenses incurred in connection  
with the sale be paid first from the proceeds.

(b) That the Trust Deed in favor of FMA together with  
all costs and expenses necessarily incurred be paid.

1 The amount to be paid thereon is \$441,541.84.

2 (c) That the remainder be paid to Thomas and Karen N.  
3 Herr.

4 3. That the sale of the property shall be free and clear  
5 of any lien or claim by the parties and shall be free of any  
6 right of redemption by the parties.

7 4. That upon dispersal of the funds as provided herein,  
8 that this matter may be dismissed.

9 DATED this 27 day of Feb, 1980.

10 BY THE COURT:

11  
12 By [Signature]  
13 Judge

14 Approved as to form:

15  
16 [Signature]  
17 David F. Klomp

18  
19 [Signature]  
20 Glen E. Davies

21  
22 [Signature]  
23 Neil Sabin

24  
25 [Signature]  
26 Richard A. Rappaport

27  
28 [Signature]  
29 Kent M. Kasting

STATE OF UTAH )  
COUNTY OF SALT LAKE ) ss  
I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO  
CERTIFY THAT THE ANNEXED AND FOREGOING IS  
A TRUE AND FULL COPY OF AN ORIGINAL  
MENT ON FILE IN MY OFFICE AS SUCH CLERK.  
WITNESS MY HAND AND SEAL OF SAID COURT  
THIS 22 DAY OF March 1980  
H DIXON HINDLEY, CLERK  
BY [Signature] DEF

PARCEL I:

BEGINNING on the South line of the South fork of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, said point being 423 feet, more or less, South from the West quarter of said Section, and running thence South along said West line 897 feet, more or less to South line of the Northwest quarter of the Southwest quarter; thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less; thence South 03°04' East 417.42 feet; thence South 85°47' West 417.42 feet; thence North 87°53' West 164.94 feet; thence North 60°30'16" West 109.04 feet; thence North 58°13'18" West 144.21 feet; thence North 66°15'14" West 187.97 feet; thence Northeasterly along Westerly line of Joseph F. Sturdy property to the South line of Little Cottonwood road; thence Southwesterly along said South line of road to the point of BEGINNING.

PARCEL II:

BEGINNING at a point 151.46 feet South, 1162.3 feet East and North 85°47' East 178.15 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the Southline of said road 100 feet, more or less, to the West line of W. Douglas Shewmaker property; thence South along said West line 1200 feet, more or less, to the Southline of Grantor's property; thence West 100 feet, more or less, to a point due South of the point of beginning; thence North 1190.9 feet more or less, to the point of BEGINNING.

PARCEL III:

BEGINNING 151.93 feet South, and 1153.94 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian and running thence along the Southerly line of Little Cottonwood Road North 85°47' East 184.53 feet, thence South 1190.90 feet, thence North 89°36'15" West 184.04 feet, thence North 1176.06 feet to the point of BEGINNING.

PARCEL IV:

BEGINNING at a point which is South 53°37'30" East 363.05 feet and North 85°47' East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, and running thence North 85°47' East 417.42 feet; thence South 3°04' West 417.42 feet; thence South 85°47' West 417.42 feet; thence North 3°04' West 417.42 feet to the point of BEGINNING.

Subject to the following:

1. Any and all taxes of any nature.
2. Any charges and assessments of the Salt Lake County Cottonwood Sanitary District within which the property is included.
3. Any charges and assessments of Salt Lake County Special District No. 1.
4. The right of Salt Lake County to reassess the Tax Assessment on said property in accordance with Sections 59-5-86 to 105, Utah Code Annotated, 1953, as disclosed by that certain Annual Application for Assessment and Taxation of Agricultural Land 1969 Farmland Assessment Act dated October 15, 1975 and recorded October 15, 1975 as Entry No. 2751362 in Book 3998 at page 254 of Official Records.
5. Any and all utility or irrigation easements including the following:
  - a. An Easement in favor of Utah Power and Light Company dated May 19, 1961 and recorded August 9, 1961 as Entry No. 1793162, Book 1829, page 458.
  - b. An Easement in favor of Utah Power & Light Company dated August 7, 1962 and recorded as Entry No. 1878407, Book 1980, page 436.
  - c. An Easement in favor of the South Despain Ditch Company and/or the Utah Water and Power Board dated July 1, 1963 and recorded December 13, 1963 as Entry No. 1953010, Book 2133, page 253.

FMA LEASING COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake City, County of Salt Lake, State of Utah, Grantor, hereby CONVEYS AND WARRANTS against all claiming by, through, or under it to ALTARIDGE ASSOCIATES, a Utah general partnership, Grantees, of Salt Lake City, County of Salt Lake, State of Utah, for the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the following described tracts of land in Salt Lake County, State of Utah:

PARCEL I:

BEGINNING on the South line of the South fork of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, said point being 423 feet, more or less, South from the West quarter of said Section, and running thence South along said West line 897 feet, more or less to South line of the Northwest quarter of the Southwest quarter; thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less; thence South 03°04' East 417.42 feet; thence South 85°47' West 417.42 feet; thence North 87°53' West 164.94 feet; thence North 60°30'16" West 109.04 feet; thence North 58°13'18" West 144.21 feet; thence North 66°15'14" West 187.97 feet; thence Northeasterly along Westerly line of Joseph F. Sturdy property to the South line of Little Cottonwood road; thence Southwesterly along said South line of road to the point of BEGINNING.

PARCEL II:

BEGINNING at a point 151.46 feet South, 1162.3 feet East and North 85°47' East 178.15 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the Southline of said road 100 feet, more or less, to the West line of W. Douglas Shewmaker property; thence South along said West line 1200 feet, more or less, to the Southline of Grantor's property; thence West 100 feet, more or less, to a point due South of the point of beginning; thence North 1190.9 feet more or less, to the point of BEGINNING.

PARCEL III:

BEGINNING 151.93 feet South, and 1153.94 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian and running thence along the Southerly line of Little Cottonwood Road North 85°47' East 184.53 feet, thence South 1190.90 feet, thence North 89°36'15" West 184.04 feet, thence North 1176.06 feet to the point of BEGINNING.

PARCEL IV:

BEGINNING at a point which is South 53°37'30" East 363.05 feet and North 85°47' East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base & Meridian, and running thence North 85°47' East 417.42 feet; thence South 3°04' West 417.42 feet; thence South 85°47' West 417.42 feet; thence North 3°04' West 417.42 feet to the point of BEGINNING.

Subject to the following:

1. Any and all taxes of any nature.
2. Any charges and assessments of the Salt Lake County Cottonwood Sanitary District within which the property is included.
3. Any charges and assessments of Salt Lake County Special District No. 1
4. The right of Salt Lake County to reassess the Tax Assessment on said property in accordance with Sections 59-5-86 to 105, Utah Code Annotated, 1953, as disclosed by that certain Annual Application for Assessment and Taxation of Agricultural Land 1969 Farmland Assessment Act dated October 15, 1975 and recorded October 15, 1975 as Entry No. 2751362 in Book 3998 at page 254 of Official Records.
5. Any and all utility or irrigation easements including the following:
  - a. An Easement in favor of Utah Power and Light Company dated May 19, 1961 and recorded August 9, 1961 as Entry No. 1793162, Book 1829, page 458.
  - b. An Easement in favor of Utah Power & Light Company dated August 7, 1962 and recorded as Entry No. 1878407, Book 1980, page 436.
  - c. An Easement in favor of the South Despain Ditch Company and/or the Utah Water and Power Board dated July 1, 1963 and recorded December 13, 1963 as Entry No. 1966010, Book 2133, page 253.

The officers who sign this Deed hereby certify that this Deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the Grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer, this 29<sup>th</sup> day of April, 1981.

FMA LEASING COMPANY  
By: [Signature]  
Its: Executive Vice President

Attest: [Signature]  
Gean Thorpe, Secretary



STATE OF UTAH                    )  
                                      :ss.  
COUNTY OF SALT LAKE )

On the 29<sup>th</sup> day of April, 1981, personally appeared before me, LARRY R. STEVENS and GEAR THORPE, who being by me duly sworn did say, each for himself, that he, the said LARRY R. STEVENS is the Executive Vice President and she, the said Gear Thorpe, is the secretary of FMA Leasing Company, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors, and said LARRY R. STEVENS and Gear Thorpe each duly acknowledged to me that said corporation executed the same, and that the seal affixed is the seal of said corporation.

Heidi A. Astor  
Notary Public  
Residing at: Salt Lake City, Utah

My Commission Expires:

November 3, 1984

# Fidelity National Title Insurance Company

*American Land Title Association Owner's Policy – Form B – 1970 (Amended 10-17-70)*

OMAHA, NEBRASKA  
A STOCK COMPANY  
EXTENDED COVERAGE POLICY

## OWNER'S POLICY OF TITLE INSURANCE

*SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, FIDELITY NATIONAL TITLE INSURANCE COMPANY, a Nebraska corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:*

- 1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;*
- 2. Any defect in or lien or encumbrance on such title;*
- 3. Lack of a right of access to and from the land; or*
- 4. Unmarketability of such title.*

*IN WITNESS WHEREOF, Fidelity National Title Insurance Company has caused this policy to be signed and sealed by its duly authorized officers as of Date of Policy shown in Schedule A.*

FIDELITY NATIONAL TITLE INSURANCE COMPANY



By *Wb. Hanschmidt*  
President

Countersigned: \_\_\_\_\_

Authorized Signature

By \_\_\_\_\_

Secretary

Policy No. ☐ 162011

## EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.
2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant, (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder (c) resulting in no loss or damage to the insured claimant, (d) attaching or created subsequent to Date of Policy, or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

## CONDITIONS AND STIPULATIONS

### 1. Definition of Terms

The following terms when used in this policy mean:

- (a) "insured" the insured named in Schedule A, and, subject to any rights or defenses the Company may have had against the named insured, those who succeed to the interest of such insured by operation of law is distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.
- (b) "insured claimant" an insured claiming loss or damage hereunder.
- (c) "knowledge" actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.
- (d) "land" the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property, provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.
- (e) "mortgage" mortgage, deed of trust, trust deed, or other security instrument.
- (f) "public records" those records which by law impart constructive notice of matters relating to said land.

### 2. Continuation of Insurance after Conveyance of Title

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

### 3. Defense and Prosecution of Actions — Notice of Claim to be given by an Insured Claimant

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured or a defendant interposed against an insured in an action to enforce a contract for a sale of the estate or interest in said land, to the extent

that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required, provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy.

(d) Whenever the Company shall have brought any act on or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein and permit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, each insured shall give the Company all reasonable aid in any such action or proceeding, including settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

### 4. Notice of Loss — Limitation of Action

In addition to the notices required under paragraph 3(b) of these Conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action

SCHEDULE A

Date of Policy

POLICY NUMBER

May 11, 1981 @3:46 p.m.

AMOUNT

O 162011

\$ 516,730.65

Case No. 17026

Premium \$2,278.50

1. Name of Insured

(EXTENDED COVERAGE POLICY)

ALTARIDGE ASSOCIATES

2. The estate or interest in the land described herein and which is covered by this Policy is

FEE SIMPLE

3. The estate or interest referred to herein is at Date of Policy vested in:

ALTARIDGE ASSOCIATES, a Utah General Partnership

4. The land referred to in this Policy is described as follows:

PARCEL 1

Beginning on the South line of the South fork of Little Cottonwood Road on the West line of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being 423 feet, more or less, South from the West quarter of said section, and running thence South along said West line 897 feet, more or less, to South line of the Northwest quarter of the Southwest quarter; thence East along said South line 1160 feet, more or less, to the West line of Albert Van Woerden property; thence North along said West line 1210 feet, more or less, to the South line of Little Cottonwood Road; thence Westerly along said South line 110 feet, more or less; thence South 03°04' East 417.42 feet; thence South 85°47' West 417.42 feet; thence North 87°53' West 164.94 feet; thence North 60°30'16" West 109.04 feet; thence North 58°33'18" West 144.21 feet; thence North 66°15'14" West 187.97 feet; thence Northeasterly along Westerly line of Joseph F. Sturdy property to the South line of Little Cottonwood Road; thence Southwesterly along said South line of road to the point of beginning.

PARCEL 2

Beginning at a point 151.46 feet South 1162.3 feet East and North 85°47' East 178.14 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, said point being on the South line of Little Cottonwood Road and the East line of Albert Van Woerden property; and running thence Easterly along the South line of said road 100 feet, more or less, to the West line of W. Douglas Shewmaker property; thence South along said West line 1200 feet, more or less, to the South line of Grantor's property; thence West 100 feet, more or less, to a point due South of the point of beginning; thence North 1190.9 feet, more or less, to the point of beginning.

(CONTINUED)

This Policy Valid Only If Schedule B Is Attached

PARCEL 3

Beginning 151.93 feet South and 1153.94 feet East from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian and running thence along the Southerly line of Little Cottonwood Road North 85°47' East 184.53 feet, thence South 1190.90 feet, thence North 89°36'15" West 105.04 feet, thence North 1176.06 feet to the point of beginning.

PARCEL 4

Beginning at a point which is South 53°37'30" East 363.05 feet and North 85°47' East 337.90 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 85°47' East 417.42 feet; thence South 3°04' East 417.42 feet; thence South 85°47' West 417.42 feet; thence North 3°04' West 417.42 feet to the point of beginning.

SUBJECT TO a right of way over and across the following: Beginning at a point which is South 53°37'30" East 363.05 feet and North 85°47' East 337.90 feet and South 3°04' East 196.21 feet from the West quarter corner of Section 12, Township 3 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 85°47' East 392.42 feet; thence North 3°04' West 194.21 feet; thence North 85°47' East 25.0 feet; thence South 3°04' East 221.21 feet; thence South 85°47' West 417.42 feet; thence North 3°04' West 25.0 feet to the point of beginning.

All Situate in Salt Lake County, State of Utah.

Policy Number \_\_\_\_\_

File No 17026 SCHEDULE B — PART I

This policy does not insure against loss or damage by reason of the following:

1. Taxes for 1981 are accruing as a lien but not yet due and payable. Taxes for 1980 have been paid. Serial No. 33C1075 (as to Parcel 1) and have been paid for Serial No. 33C1081-002 (as to Parcel 2) and have been paid for Serial No. 33C1081-003 (as to Parcel 3) and have been paid for Serial No. 33C1085-001 (as to Parcel 4)
2. Property is located within the boundaries of Salt Lake County Cottonwood and is subject to assessments and service charges made thereby.
3. Easement dated July 1, 1963, in favor of THE STATE OF UTAH, acting through the UTAH WATER AND POWER BOARD, for an easement for the full use of the South Despain Ditch Company's Irrigation distribution system, said easement recorded December 13, 1963, as Entry No. 1966010, Book 2133, Page 253 of official records. (All Parcels)
4. Pole Line Easement dated May 19, 1961, in favor of UTAH POWER AND LIGHT COMPANY, for a right of way for the erection and continued maintenance, repair, alteration and replacement of the electric transmission distribution and telephone circuits of the Grantee and 2 guy anchors and 2 poles, with the necessary guys, stubs, crossarms and other attachments thereto, or affixed thereto, for the support of said circuits, to be erected and maintained upon and across the said property, said easement recorded August 9, 1961, as Entry No. 1793162, Book 1829, Page 458 of official records. (as to Parcel 1)
5. Pole Line Easement dated August 7, 1962, in favor of UTAH POWER AND LIGHT COMPANY, for a right of way for the erection and continued maintenance, repair, alteration, and replacement of the electric transmission, distribution and telephone circuits of the Grantee and 2 guy anchors and 4 poles, with the necessary guys, stubs, crossarms and other attachments thereon, or affixed thereto, for the support of said circuits, to be erected and maintained upon and across the said property, said easement recorded October 31, 1962, as Entry No. 1878407, Book 1980, Page 436 of official records. (as to Parcel 3)
6. Trust Deed dated April 28, 1981, executed by ALTA RIDGE ASSOCIATES, Trustors, in favor of ALTA TITLE COMPANY, Trustee and HORMAN BROTHER PARTNERSHIP, Beneficiary, in the amount of \$650,000.00, recorded May 11, 1981, as Entry No. 3563406 of official records.

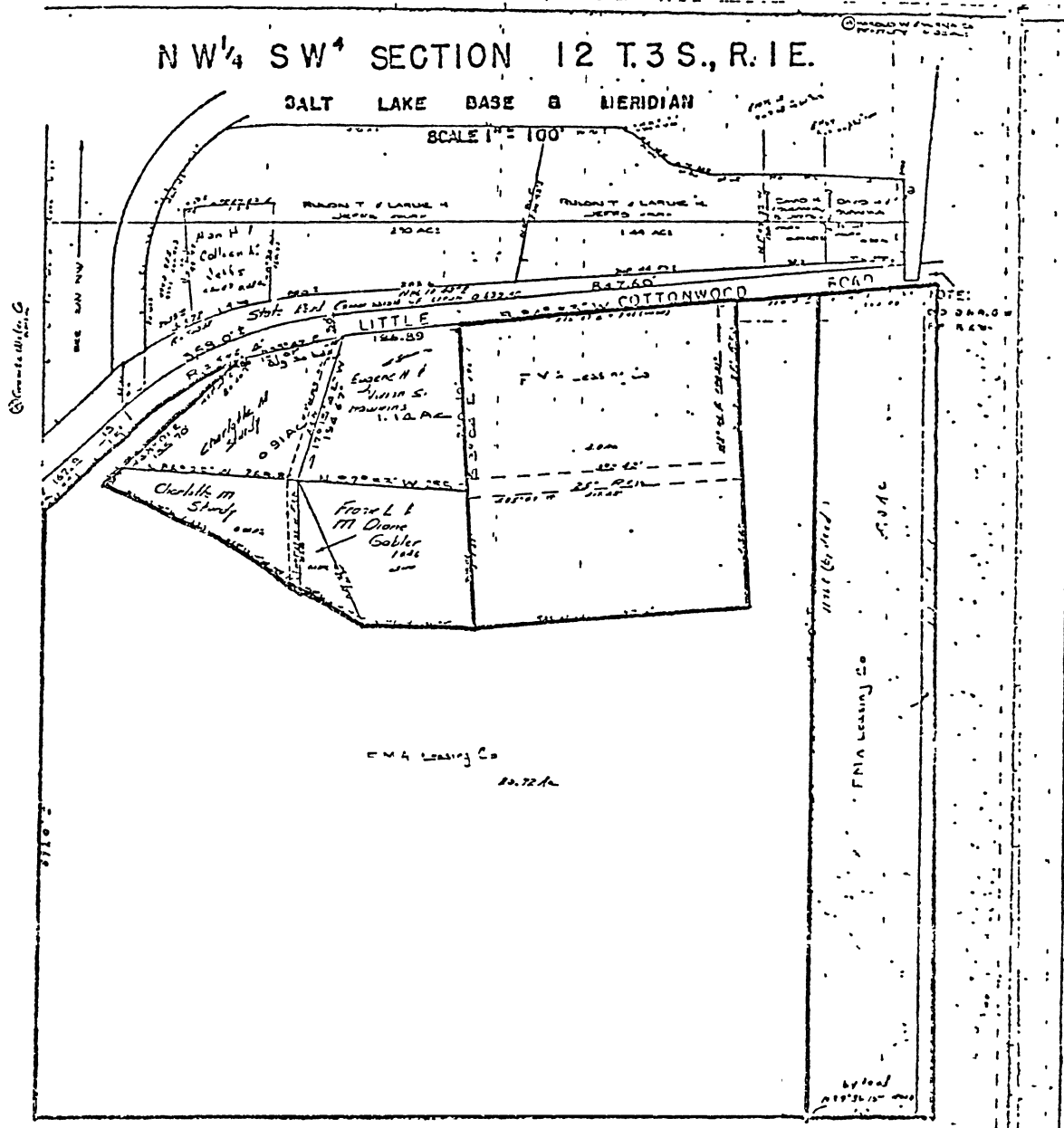
Schedule B of this policy consists of \_\_\_\_\_ Page

THIS PLAT IS MADE SOLELY FOR THE PURPOSE OF  
 SETTING OUT LOCATING THE LAND, AND THE COMPANY  
 ASSUMES NO LIABILITY FOR VARIATIONS, IF ANY, WITH  
 AN ACTUAL SURVEY

# NW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> SECTION 12 T.3 S., R.1 E.

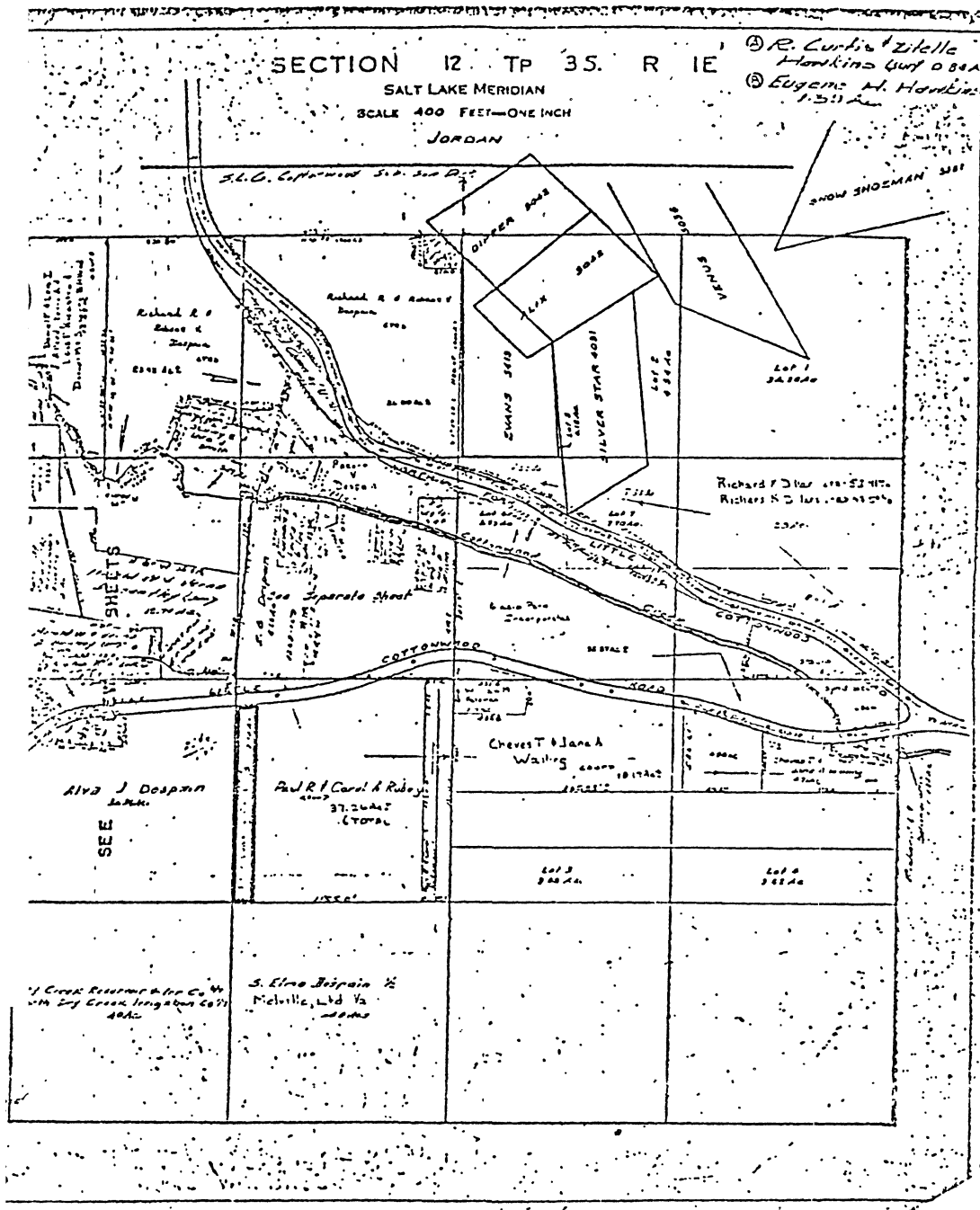
SALT LAKE BASE & MERIDIAN

SCALE 1" = 100'



JORDAN

(1) R. Curtis & Zille  
Hawkins 400 084A  
(2) Eugene M. Hawkins  
1.3.11





**CONDITIONS AND STIPULATIONS**  
(CONTINUED)

shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage.

**5. Options to Pay or Otherwise Settle Claims**

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment, by the insured claimant and authorized by the Company.

**6. Determination and Payment of Loss**

(a) The liability of the Company under this policy shall in no case exceed the least of

(i) the actual loss of the insured claimant, or

(ii) the amount of insurance stated in Schedule A.

(b) The Company will pay, in addition to any loss insured against by this policy, all costs imposed upon an insured in litigation carried on by the Company for such insured, and all costs, attorneys' fees and expenses in litigation carried on by such insured with the written authorization of the Company.

(c) When liability has been definitely fixed in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

**7. Limitation of Liability**

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, as insured, within a reasonable time after receipt of such notice, (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as insured, as provided in paragraph 3 hereof, or (c) for liability voluntarily assumed by an insured in settling any claim or suit without prior written consent of the Company.

**8. Reduction of Liability**

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company.

**9. Liability Noncumulative**

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring either (a) a mortgage shown or referred to in Schedule B hereof which is a lien on the estate or interest covered by this policy, or (b) a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A and the amount of payment shall be reduced by the amount of any such mortgage. The Company shall have the option to apply to the payment of any such mortgage any amount that otherwise would be payable hereunder to the insured owner of the estate or interest covered by this policy and the amount so paid shall be deemed a payment under this policy to said insured owner.

**10. Apportionments**

If the land described in Schedule A consists of two or more parcels which are not used as a single site, and a loss is established

affecting one or more of said parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each such parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement herein or by an endorsement attached hereto.

**11. Subrogation Upon Payment or Settlement**

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. If loss should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

**12. Liability Limited to this Policy**

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

**13. Notices, Where Sent**

(Provisions relating to notice shall conform to the practice of the issuing company, the following is shown as an illustration.)

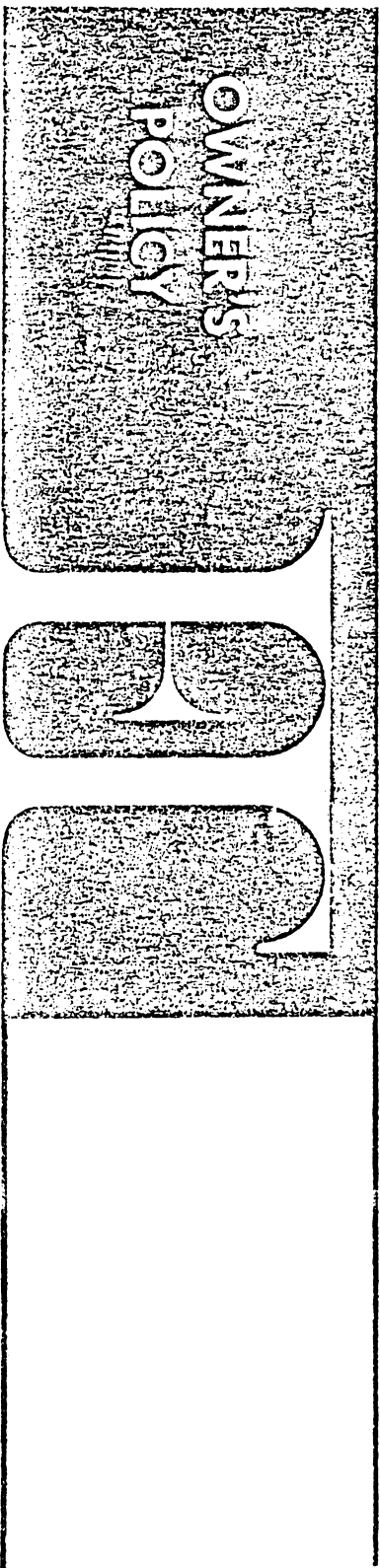
All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at its main office (or the office issuing such policy).

**FIDELITY NATIONAL TITLE INSURANCE COMPANY**

516 Farm Credit Bldg  
19th & Douglas  
Omaha, Nebraska 68102

# Fidelity National Title Insurance Company

516 FARM CREDIT BUILDING 19th & DOUGLAS  
OMAHA, NEBRASKA 68102  
Telephone 402 346-5466



**FILMED**

APR -2 1984

H. Dean Hadley, Clerk 3rd Dist. Court  
By E. J. Harrison  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALTA RIDGE ASSOCIATES and  
FMA LEASING COMPANY,

:

SPECIAL VERDICT

Plaintiff,

:

CIVIL NO. C-82-9240

vs.

:

CITIZENS BANK and KEN BAXTER,

:

Defendants.

We, the jury, find from a preponderance of the evidence in  
this case, the following answers to the questions propounded to us:

1. Did Dale Morgan receive consideration from 4-Seasons  
for the trust deed note he gave to 4-Seasons?

ANSWER: Yes \_\_\_\_\_ No /

2. Was the trust deed note given to 4-Seasons by Dale Morgan  
conditioned upon the happening of specific circumstances that did  
not occur?

ANSWER: Yes / No \_\_\_\_\_

3. Did FMA intend to merge its March 8, 1978 trust deed  
from Dale Morgan when it took the quit-claim deed from Dale Morgan  
on June 5, 1978?

ANSWER: Yes / No \_\_\_\_\_

4. Did Citizens Bank have notice of FMA's foreclosure  
action prior to February 10, 1981, when Citizens Bank

ALTA RIDGE ASSOC., ET AL  
VS. CITIZENS BANK, ET AL

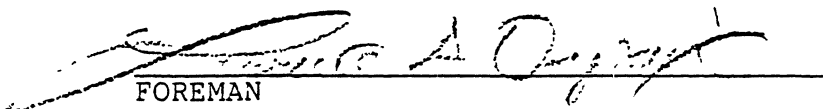
PAGE TWO

SPECIAL VERDICT

gave the \$42,000.00 loan to 4-Seasons?

ANSWER: Yes \_\_\_\_\_ No ✓

The foregoing answers agreed to, signed and returned to  
court this 30 day of March, 1984.

  
FOREMAN

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

December 15, 1987

OFFICE OF THE CLERK

---

Donald J. Winder, Esq.  
Kathy A. F. Davis  
WINDER & HASLAM  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

Alta Ridge Associates and  
FMA Leasing Company,  
Plaintiffs and Respondents,

v.

No. 20245

Citizens Bank and Ken Baxter,  
Defendants, Appellant  
and Cross-Respondent.

FMA Leasing Company,  
Third-Party Plaintiff,

v.

Alta Title Company and Fidelity  
National Title Insurance Company,  
Third-Party Defendants  
and Cross-Appellant.

This cause having been designated for decision under Rule 30(d), Rules of the Utah Supreme Court, it is hereby ordered, adjudged and decreed that the judgment of the trial court herein be affirmed.

Geoffrey J. Butler, Clerk

# PARSONS & CROWTHER

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

453 SOUTH THIRD EAST STREET  
SALT LAKE CITY, UTAH 84111

TELEPHONE 521-0885  
AREA CODE 901

JOHN PARSONS  
THOMAS N. CROWTHER  
THOMAS M. LANE  
RICHARD L. BEARD  
DENTON V. HASLAM  
CRYSTAL J. CRASS  
PAUL H. SHAFERIKY

December 22, 1982

Steven E. Clyde, Esq.  
Clyde & Pratt  
77 West 200 South, #200  
Salt Lake City, Utah 84101

Re: Alta Via Property & Alta Ridge

Dear Steve:

This letter shall confirm the permission given by Mr. James and by you to involve Alta Ridge Associates in the current lawsuit involving the Alta Via property. Pursuant to your request, enclosed are copies of all of the pleadings currently on file on this case. It is our understanding that Parsons & Crowther will represent Alta Ridge Associates in this matter.

Under Paragraph 3. of the Conditions and Stipulations of Alta Ridge's title policy, Alta Title Company has elected to substitute Alta Ridge Associates as the real party in interest in this action under Paragraph 3(e) which states:

In all cases where this policy permits or requires the Company [Alta Title Company] to prosecute or provide for the defense of any action or proceeding, the insured hereunder [Alta Ridge Associates] shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, in all appeals and permit the Company to use, at its option, the name of such insured for such purposes. Whenever requested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

Sincerely,

PARSONS & CROWTHER



Donald J. Winder

CJC:skw  
Enclosures

cc: Milo S. Marsden  
Bob Gross  
Gary Carlson

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

OCT -2 1986

H. Dixon Hindley, Clerk 3rd Dist. Court  
By Frederick J. Thompson  
Deputy Clerk

1 MILO S. MARSDEN, JR. A2086  
2 MARSDEN, ORTON, CAHOON & LILJENQUIST  
3 ATTORNEYS FOR FMA LEASING COMPANY  
4 68 SOUTH MAIN, FIFTH FLOOR  
5 SALT LAKE CITY, UTAH 84101  
6 TELEPHONE: (801) 521-3800

7 -----  
8 IN THE THIRD JUDICIAL DISTRICT COURT OF  
9 SALT LAKE COUNTY, STATE OF UTAH  
-----

10 ALTA RIDGE ASSOCIATES and )  
11 FMA LEASING COMPANY, )

12 Plaintiffs, )

13 vs. )

14 CITIZENS BANK and KEN BAXTER, )

15 Defendants. )

16 ----- )  
17 FMA LEASING COMPANY, )

18 Third-Party )  
19 Plaintiff, )

20 vs. )

21 ALTA TITLE COMPANY and )  
22 FIDELITY NATIONAL TITLE )  
23 INSURANCE COMPANY, )

24 Third-Party )  
Defendants. )  
-----

ORDER

Civil NO. C82-9240

001625

1 Pursuant to Rule 56 of the Utah Rules of Civil Procedure,  
2 this cause came on to be heard on:

3 (1) Alta Ridge Associates Motion for Partial Summary  
4 Judgment on its Cross-Claim against FMA Leasing Company; and

5 (2) Fidelity National Insurance Company's Motion for  
6 Summary Judgment seeking summary judgment in its favor  
7 against FMA Leasing Company on FMA Leasing Company's Third-  
8 Party Complaint against Fidelity National Insurance Company.

9 The Court having heard argument of legal counsel for Alta  
10 Ridge Associates and Fidelity National Title Insurance Company,  
11 and legal counsel for FMA Leasing Company, and having taken the  
12 matters under advisement to consider the briefs and arguments of  
13 the parties, and having considered the Affidavits filed in  
14 connection with the Motions, the pleadings, and having reviewed  
15 the affidavit of David Klomp, and due deliberation having been  
16 had thereon, it is

17 ORDERED, that Alta Ridge Associates' Motion for Partial  
18 Summary Judgment on its Cross-Claim against FMA Leasing Company  
19 under the theories of negligence and indemnification be and  
20 hereby is denied, and it is further

21 ORDERED, that Alta Ridge Associates' Motion for Partial  
22 Summary Judgment on its Cross-Claim against FMA Leasing Company  
23 under the theory of breach of deed warranty is granted on the  
24




1 limited finding that damages may be recoverable, if any are  
2 shown, from FMA to Alta Ridge for the defense asserted by Alta  
3 Ridge of the claims asserted against Alta Ridge's title by  
4 Citizens Bank, based upon the warranty obligations, and it is  
5 further

6 ORDERED, that Fidelity National Title Insurance Company's  
7 Motion for Summary Judgment seeking dismissal of FMA's Third  
8 Party Complaint be and hereby is denied.

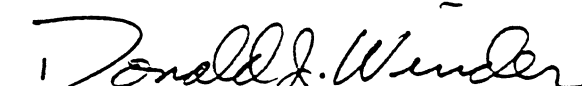
9 DATED this 2 day of <sup>October</sup>~~August~~, 1986.

10 BY THE COURT,

11   
12 Timothy R. Hanson,  
13 District Court Judge

14 Approved as to Form:

15  
16 \_\_\_\_\_  
17 Milo S. Marsden, Jr.  
18 Attorney for FMA Leasing Co.

19   
20 Donald J. Winder  
21 Kathy A. F. Davis  
22 Attorneys for Alta Ridge Associates  
23  
24



FMA Leasing Company ("FMA") to reconsider this Court's award of partial summary judgment came on for hearing before the Honorable Timothy R. Hanson on the 27th day of October, 1988 at the hour of 9:00 a.m. Fidelity and Alta Ridge Associates ("Alta Ridge"), Fidelity's insured, were represented by their counsel Donald J. Winder and Kathy A. F. Davis, FMA was represented by its counsel Stewart M. Hanson, Jr., and Charles P. Sampson. Geri Allison appeared on behalf of Moore Leasing Company. The Court, having heard the arguments of counsel, having considered the pleadings which were timely filed in the matter, having received the Stipulation of counsel for FMA that the fees incurred by Mr. Winder in defending the issues relating to the assignment of the Four Seasons Trust Deed were necessary, reasonable and in accordance with the rates customarily charged in the community, and good cause appearing therefor, IT IS HEREBY ORDERED:

1. The Motion of FMA to reconsider the partial summary judgment granted by the Court pursuant to Memorandum Decision dated July 15, 1986 is hereby denied.

2. Based upon FMA's breach of the deed warranties in the Special Warranty Deed FMA delivered to Alta Ridge, Fidelity is entitled to recover from FMA its attorney's fees in the amount set forth in the Affidavit of Kathy A. F. Davis dated June 24, 1988 in the amount of \$50,022.15 as of April 30, 1988 as damages which have been established by Affidavit and Stipulation

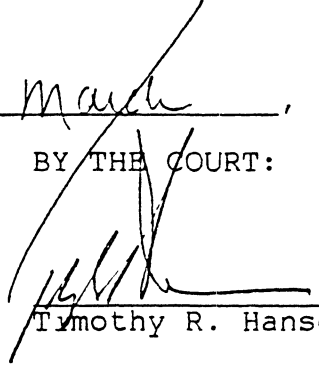
SU111-4004  
175 W 51 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322 2222

of counsel for FMA and were incurred in the defense asserted by Fidelity on behalf of Alta Ridge, of the claims asserted against Alta Ridge's title by Citizens Bank.

3. Pursuant to Utah R. Civ. P., Rule 54(b), this Court determines that there is no just reason for delay and expressly directs that this Order be entered as a final judgment.

DATED this 31 day of March, 1989.

BY THE COURT:

  
Timothy R. Hanson, Judge

**ATTEST**

By 

WINDER & HASLAM  
A PROFESSIONAL CORPORATION  
SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322-2222

1 IN THE THIRD JUDICIAL DISTRICT COURT OF  
2 SALT LAKE COUNTY, STATE OF UTAH  
3

4 ALTA RIDGE ASSOCIATES and )  
5 FMA LEASING COMPANY, )

Civil No. C82-9240

6 Plaintiffs, )  
7

8 vs. )

9 CITIZENS BANK AND KEN BAXTER, )

10 Defendants. )  
11

12 FMA LEASING COMPANY, )  
13

14 Third-Party )  
15 Plaintiff, )

16 vs. )

17 ALTA TITLE COMPANY and )  
18 FIDELITY NATIONAL TITLE )  
19 INSURANCE COMPANY, )

20 Third-Party )  
21 Defendants. )  
22

OCT 27 1988

H. D. Hanson, Third Judicial District Court  
By: E. M. Peterson  
Deputy Clerk

23 BE IT REMEMBERED that the above-entitled cause  
24 came on regularly for hearing before the Honorable Timothy  
25 R. Hanson, a Judge of the Third Judicial District Court  
of the State of Utah, at Salt Lake City, Salt Lake  
County, State of Utah on the 27th day of October, 1988,  
at 9:00 a.m., and that the following proceedings were  
had.

ORIGINAL

BUNNY C. NEUENSCHWANDER, CSR, RPR

Page 1

0047

001554

\* \* \*

A P P E A R A N C E S

FOR ALTA RIDGE ASSOCIATES:  
and FIDELITY NATIONAL TITLE  
INSURANCE COMPANY

Donald J. Winder  
Kathy A. F. Davis  
WINDER & HASLAM  
Suite 4004  
175 West 200 South  
Salt Lake City, Utah 84110

FOR FMA:

Stewart M. Hanson, Jr.  
Charles P. Sampson  
Geri Allison  
SUITTER, AXLAND, ARMSTRONG  
& HANSON  
700 Clark Leaming Office  
Center  
175 South West Temple  
Salt Lake City, Utah 84101

1 PROCEEDINGS

2 October 27, 1988

3 THE COURT: I understand. Well, it's time for  
4 this thing to come to a rest. I don't know how to  
5 approach this problem with the memorandum decision. If  
6 I'd follow the advice of my colleagues, I wouldn't find  
7 myself in troubles. Just not write any. But the Supreme  
8 Court has indicated that they like to know why. I think  
9 attorneys like to, and are entitled to know why, and so  
10 even though it gets me in trouble, I'll continue to do  
11 it.

12 Here's what it boils down to. The long and the  
13 short of it is, to the extent that the memorandum  
14 decision is not as artfully written, or as clear as it  
15 probably ought to be, and I don't intend to offer any  
16 excuses for that, I just do the best I can with the  
17 resources I have, it requires occasionally to revisit  
18 those to determine whether or not the court said what  
19 people interpret in different ways. As I a hear your  
20 arguments, and as I read through the moving papers, and  
21 the attachments last evening, and in an attempt to  
22 refresh my recollection as to what transpired on -- not  
23 only during the course of the trial, but all the other  
24 motions, and what led up to this memorandum decision I  
25 wrote, and why I said what I said, I think while I

1 certainly don't have everything clearly in mind as I did  
2 when I wrote this memorandum decision, I think I've  
3 satisfied myself at least that I have things in mind  
4 clear enough so that I recall why I did what I did.

5       The big problem, I suppose, surrounds this term may.  
6 One, damages that may be recoverable, and secondly  
7 whether or not I was wrong on this breach of warranty and  
8 I ought to change my mind. Those are the two issues. I  
9 granted partial Summary Judgment in this memorandum  
10 decision. And in granting partial Summary Judgment, you  
11 either grant partial Summary Judgment or you don't. You  
12 the word may, while it certainly could be interpreted in  
13 the way Mr. Hanson suggests, is not what I had in mind.  
14 What I had in mind was they were entitled to the fees,  
15 entitled to the damages in defending, but Mr. Winder had  
16 to prove it. In other words, he would have to submit an  
17 affidavit. There would have to be an evidentiary hearing  
18 as to the amount, reasonableness, necessity of attorneys'  
19 fees, not that I was going to reconsider the question of  
20 legal entitlement, if you will, although that evidence of  
21 course is part of legal entitlement.

22       But that's the reason I used the word may, and in  
23 reflection I should have used shall. But then Mr. Winder  
24 may have argued that he was entitled to anything he asked  
25 for. And -- well, I don't think he would have said that,



1 but some might have. And obviously that would not be my  
2 intention. The intention there was if Mr. Winder can  
3 make out a prima facie case with regard to the amount,  
4 and reasonableness, and necessity of attorneys' fees,  
5 then he's entitled to them under Summary Judgment.  
6 Otherwise, I didn't grant Summary Judgment. So, I don't  
7 have any problem stating for the record clearly what I  
8 intended when I used the word may, and I don't know that  
9 the other option shall would have been anymore concise,  
10 or anymore clear as to what the court's intentions were.  
11 Because that could have been interpreted wrong too. It's  
12 just a problem with communication, and a word that really  
13 doesn't fit. Maybe there isn't one, at least not in my  
14 vocabulary, and admittedly I could stand some  
15 improvement.

16 In any event, that solves that problem as far as  
17 I'm concerned. I granted Summary Judgment, and my intent  
18 was just exactly that.

19 The next question is, I suppose, and I really take  
20 it in the form of a motion to take a look at what I did,  
21 and see if I did it wrong before. Two things come to  
22 mind. First, I ruled on this thing once, and I hope I'm  
23 not so retractable that if I am satisfied that I'm wrong  
24 that I won't change my mind just because I've done it. I  
25 certainly don't have any vanity that would preclude that,

1 at least I hope not. If I'm wrong, and it's brought to  
2 my attention, I'll change my mind. If I'm wrong and I'm  
3 convinced that I'm not wrong, I guess the Supreme Court  
4 will tell me about it. But even taking that -- or not  
5 taking that into account, the fact that I've already  
6 ruled in this case, and I really don't like motions to  
7 reconsider unless there is something new, re-arguing the  
8 same thing, which I see occasionally, is distressful.

9 But even putting that aside, what I've heard here  
10 today, and what I've read in these matters, I'm still  
11 convinced that I was right the first time. And that is  
12 there was -- that Summary Judgment was appropriate on the  
13 warranty obligations. The other issues are still open, I  
14 suppose. As far as the warranty is concerned, I'm still  
15 satisfied the position asserted by Mr. Winder is correct.  
16 And so having said that, he's entitled to his attorneys'  
17 fees. And he's entitled to the amount that's in the  
18 affidavit based upon the stipulation as to  
19 reasonableness, and he's entitled to attorneys' fees in  
20 defending that action.

21 So, I'm going to grant the motion in that regard.  
22 Mr. Winder, will you prepare an appropriate order that  
23 attempts to itemize the things that I've discussed here  
24 today so that it's clear from the order what my intent  
25 was in making this ruling?

1                   MR. WINDER: I will, Your Honor. There's the  
2 one final matter, Your Honor.

3                   MR. HANSON: Before we address that, let me ask  
4 the court to do two things, and make a sua sponte motion  
5 with regard to each one of them. Let me first point out  
6 what I pointed out to begin with. That is, if in fact we  
7 have an obligation to pay Alta Ridge's action and through  
8 Alta Ridge to Fidelity National, we still have claims  
9 against Fidelity National that are pending in this  
10 action. Those become part of our damages under those  
11 claims. And what I would ask is, first that this court  
12 stay any execution of any judgment or award of attorneys'  
13 fees pending the outcome of all of those other matters,  
14 because there are going to be setoffs involved if we're  
15 correct in our view.

16                  If the court's not disposed to do that, let me  
17 alternatively move pursuant to Rule 54B for the court to  
18 certify this issue under Rule 54B, because I think it's  
19 an important issue. I think we've raised today, quite  
20 frankly may be for the very first time before this court,  
21 issues that I think really control the governing law in  
22 this matter. And I think it would be appropriate to have  
23 the issue certified so that we could have that issue  
24 addressed in an action that involves still pending  
25 multiple claims with multiple parties.

1           THE COURT:  What I'd like to do on both of  
2 those, Mr. Hanson is defer making a decision on that, and  
3 give you an opportunity to file a written motion on both  
4 those issues, and give Mr. Winder an opportunity to  
5 respond.  I think they are both significant issues, and  
6 perhaps maybe are well taken.  If they are, I think I  
7 ought to give both sides an opportunity to be heard.

8           MR. WINDER:  Perhaps just to shorten that, if  
9 Mr. Hanson's client wants to post a bond in the  
10 appropriate amount, I would agree to a stay pending  
11 whatever is going to happen.

12           MR. HANSON:  I suspect that Mr. Winder knows  
13 that my client is probably good for the amount, and that  
14 no bond is really needed.  If what he's really saying is  
15 that he would stipulate to that, I'd be happy to do that,  
16 and I'm sure he knows my client isn't going to go  
17 anywhere.

18           MR. WINDER:  Except, Your Honor, for the fact  
19 that I would want to insist upon a bond.  There have been  
20 too many bank failures, and big banks, and I don't know  
21 about Mr. Hanson's client.  If they want a bond for the  
22 amount, I'd stipulate to a stay.

23           THE COURT:  Well, see if you can work that out,  
24 gentlemen.  If you can't --

25           MR. HANSON:  We'll talk about that.  I'll see

1 if I can satisfy him with something else.

2 THE COURT: In any event, let me suggest that  
3 I'll certainly consider those upon appropriate written  
4 application.

5 MR. HANSON: Thank you, Your Honor.

6 THE COURT: Anything else, Mr. Winder?

7 MR. WINDER: Yes, Your Honor. You mentioned a  
8 matter. You mentioned the matter of attorneys' fees. I  
9 have a printout of a portion of our bill, which portion  
10 relates to the services that were performed on the fifth  
11 day of August, which was the day that we were here  
12 arguing the matter. I have copies for counsel and for  
13 the court. To perform the mathematics, Your Honor, in  
14 terms of converting that to dollars, my hourly rate is  
15 \$120.00 an hour. Kathy's hourly rate -- Ms. Davis' is  
16 \$90.00 an hour. We have law clerks whose initials are M.  
17 L. L., J. J. L., and D. C. T. They are \$45.00 an hour.  
18 If you take those hourly rates times the hours shown on  
19 that date, the mathematics is \$1,334.25, and we would  
20 request that the court enter that award under the prior  
21 ruling concerning the motion to strike.

22 THE COURT: Let me see what you're asking for  
23 here. The page you've handed me is page two of a billing  
24 of 10-24.

25 MR. WINDER: That's correct. The 10-24 would

1 be the billing date. I wish we were much quicker than we  
2 are.

3 THE COURT: So on August 4 -- first entry is  
4 August 4.

5 MR. WINDER: I narrowed in on the day we were  
6 over here. I thought that was the intent to select that  
7 day.

8 THE COURT: That's right.

9 MR. WINDER: It's a little hard to do it  
10 otherwise. And that's how I've done it. So, I just took  
11 the second, third, fourth, fifth, sixth, and seventh  
12 entries, which are all on that day. And those are the  
13 ones to which we multiplied those hourly rates, and came  
14 up with \$1,334.25.

15 THE COURT: Why anything after the fifth?

16 MR. WINDER: Well, I didn't understand what the  
17 court's ruling was, whether it was a ruling for our  
18 having to come here, and argue that day, or whether it  
19 was a ruling in terms of the work that came after the  
20 fifth to file that brief up until the fifteenth.

21 THE COURT: I didn't make myself clear. But  
22 what I did -- what I had in mind was, obviously if Mr.  
23 Marsden had of timely filed his papers, then you could  
24 have been prepared, and presumably you would have filed  
25 some type of response though that before the hearing.

1 So, I think what you're entitled to is the time that you  
2 lost in coming over that day, and going through whatever  
3 we had to go through that day that was lost that you had  
4 to re-argue again today.

5 Now, the fact that you did further legal research,  
6 and supplemental memoranda, I suspect you would have done  
7 had you had it sufficiently in advance under the August 5  
8 hearing.

9 MR. WINDER: That's why I limited it to that  
10 day. Yes, Your Honor, I understood that to be the  
11 court's ruling.

12 THE COURT: So, I have six hours on the fifth  
13 to prepare for hearing. You have an hour and a half for  
14 the hearing itself, and on the fifth there is -- what's  
15 this business? File review, pleadings and storage?

16 MR. WINDER: We thought, Your Honor, that the  
17 matter was concluded. We sent various of the files to  
18 storage. We got Mr. Marsden's memoranda raising the  
19 arguments that we thought had been dealt with two years  
20 earlier. We had to go find all of the files. And we  
21 sent a law clerk to do that.

22 THE COURT: That was in the morning prior to  
23 the hearing. This hearing was in the afternoon.

24 MR. WINDER: It was at eleven o'clock, and I  
25 can't say, Your Honor, that all of that time -- well, I

1 can't tell, Your Honor, that all of that time was in the  
2 morning before the hearing, because the matter would have  
3 continued because of our supplemental memoranda that we  
4 were going to file. If it causes the court a problem,  
5 I'd rather just knock it out, and delete it.

6 THE COURT: Well, I want to give you what  
7 you're entitled to, but I want to make sure that the  
8 matters we're concerned with are those that you actually  
9 lost by coming over that day.

10 MR. WINDER: Right, and I couldn't say, Your  
11 Honor, that all of that had to do with just the hearing,  
12 and not subsequent things. I'd rather just strike it,  
13 Your Honor.

14 MR. HANSON: Your Honor, we'll stipulate  
15 clearly that the time that he reflects for attending the  
16 court hearing, he's clearly entitled to. I've got the  
17 same question that the court made about the others, and  
18 that is it's just not clearly identified enough that I  
19 can stipulate to that, you know, when the hearing is at  
20 eleven o'clock in the morning.

21 THE COURT: Well, let's see here.

22 MR. HANSON: And particularly in light of the  
23 fact that everything he reflects there, those are things  
24 that he would have done even in preparation for the  
25 subsequent hearing. He had to do those anyway.



1           THE COURT: Well, but the time coming over for  
2 the hearing, the hour and a half is certainly legitimate,  
3 but the thing I'm concerned about is that I would like to  
4 think that we could prepare once for those things, and  
5 have them continued for three months, and be right back  
6 where we were, but we all know different from that.  
7 That's one reason I hate to bump cases, because it costs  
8 so much money for people to prepare.

9           I think you're entitled to the entries on 8-5, Mr.  
0 Winder, the six hours in preparation, because I'm  
1 satisfied that if not all, at least a significant amount  
2 of that had to be re-done because of the delay occasioned  
3 by Mr. Marsden's late filing of his papers. And also  
4 you're entitled to the time you were here, seven and a  
5 half hours, a hundred twenty an hour. Whatever that  
6 comes out to be. Looks like \$900.00. That will be the  
7 attorneys' fees.

8           MR. WINDER: Thank you, Your Honor.

9           MR. HANSON: May I request when Mr. Winder  
0 prepares that that he prepare that as a separate document  
1 from the other document that he's going to prepare?

2           THE COURT: I assume you'll do that.

3           MR. WINDER: Of course.

4           THE COURT: All right. Thank you, gentlemen.  
5 We'll be in recess.

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REPORTER'S CERTIFICATE

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

I, BUNNY CAROL NEUENSCHWANDER, do hereby  
certify:

That I am a Certified Shorthand Reporter,  
License No. 152, and one of the official court reporters  
of the State of Utah; that on the 27th day of October,  
1988, I attended the within matter and reported in  
shorthand the proceedings had thereat; that later I  
caused my said shorthand notes to be transcribed into  
typewriting, and the foregoing pages, numbered from 3 to  
13, inclusive, constitute a full, true and correct  
account of the same to the best of my ability.

Dated at Salt Lake City, Utah, this 28th day of  
October, 1988.

  
BUNNY CAROL NEUENSCHWANDER, CSR, RPR